CERTIFICATE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1903.

No. 169. 142.

EDWARD E. BESSETTE

vs.

W. B. CONKEY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED OCTOBER 15, 1902.

(18,690.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 462.

EDWARD E. BESSETTE

vs.

W. B. CONKEY COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 26, 1903.

1 In the United States Circuit Court of Appeals for the Seventh Circuit, May Session, A. D. 1902.

EDWARD E. BESSETTE, Appellant,
v.
W. B. CONKEY COMPANY. } No. 859.

In this case, duly argued and submitted to this court, there arise questions of law concerning which the court desires the instruction and advice of the Supreme Court of the United States.

On August 24, 1901, the W. B. Conkey Company, a corporation of the State of Illinois, filed its bill of complaint against James K. Russell and many others, citizens of the State of Indiana (the appellant, Edward E. Bessette, not being a party to the cause), asking for a restraining order or orders, provisional and perpetual, against the defendants, their confederates, agents and servants, restraining them from the commission of sundry lawless acts, principally in interfering with the operation of the complainant's printing and publishing house, located at Hammond, in the State of Indiana. The bill charges that the defendants and their confederates are engaged in a conspiracy to destroy the complainant's factory and wreck its business, and to this end large bodies of men surround the complainant's factory, obstruct the highways and streets leading thereto, assault employés as they pass in and out of the factory coming to their work and returning to their homes, watch the street cars and other conveyances running to and from
2 the factory, lie in wait and threaten, terrorize, and intimidate, persons thereon who are seeking employment in complainant's factory; that they patrol the streets, places, and grounds, adjoining the factory and large groups continuously use indecent language and vile epithets to workmen and workwomen employed therein and to all seeking employment therein, with the design and intent to prevent the complainant from carrying on its business and from retaining its workmen and workwomen in its factory and to prevent them from securing others to fill places vacated by the defendants; that they threaten those employed in the complainant's factory with bodily harm if they remain in the service of the complainant and by the use of vile and abusive language and vile and insulting epithets seek to force the employés of complainant to leave and quit its service.

Upon presentation of the bill and proof by affidavits, a temporary restraining order was issued, and the defendant-, their confederates, servants and agents, and all persons aiding or abetting the defendants, or any of them, and all persons then or thereafter aiding, abetting, confederating with or acting in concert with them, or any of them, their servants or agents, were restrained and enjoined from in any manner interfering with, hindering, obstructing, or stopping, any of the business of the complainant, its agents, servants, or employés, in the operation of the factory and business at Hammond, and from entering upon the ground, factory, or premises, of the

complainant for the purpose of interfering with, hindering, obstructing, or stopping, its business, or from compelling, or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employés of complainant to refuse or fail to perform their duty as such employés
3 and also from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force, or violence, any of such employés to leave complainant's service. The order likewise forbids the defendants, either singly or in combination with others, to collect in or about the approaches to the factory and buildings of the complainant for the purpose of picketing and patrolling the grounds, streets, avenues, or gates and approaches, to the property of complainant for the purpose of intimidating, threatening, or coercing, any of the employés of complainant, or any person or persons seeking employment with them; and also from interfering with the employés in going to and from their daily work.

A writ of subpœna was issued upon the bill of complaint and served on some of the defendants, others not being found.

On October 3, 1901, upon hearing then had, the temporary restraining order previously made was continued in force until the final hearing of the case, and upon final hearing on December 3, 1901, the preliminary injunction was made perpetual against all the defendants appearing or served with process.

On September 13, 1901, the complainant filed its verified petition in the cause, informing the court that various persons, among them some of the defendants to the bill, and also the appellant, Edward E. Bessette, were in contempt of the order of the court, and asked that a writ of judgment be issued against them and that they be held to answer for such contempt and that justice be done in the premises.

It was charged in the petition, among other things, as follows:

4 "That Edward Bessette (with others named) who are not defendants by name to said bill of complaint, but who had been and are conspiring and confederating with said defendants to do the things prohibited by said restraining order, had actual notice and knowledge of the text, scope, purpose and office of said restraining order at the time of the happening of the occurrences hereinafter set forth, and in which occurrences they participated.

"That said Edward Bessette (and others named) are now in contempt of this court, and have on numerous occasions, knowingly and deliberately, violated said restraining order, and in the manner hereinafter more particularly set forth.

"That almost daily since the issuance of said restraining order, acts of brutal violence have been committed by said respondents, or some of them, upon and against your petitioner's employés, and upon persons seeking service in your petitioner's factory; that said respondents and divers other persons, acting in concert with them or under their direction, many of whom are defendants to said bill of complaint, have been and are almost daily insulting and terrorizing your petitioner's employés by the use of violence, threats and

indecent language, most of which is so vile that it cannot be incorporated herein, and have, by a system of picketing your petitioner's factory, the highways and paths leading to the same, and the homes of your petitioner's employés, completely terrorized such employés and persons seeking employment in your petitioner's factory; that the respondents herein specifically named have openly boasted in the city of Hammond that they have read said restraining order, but that they do not intend to obey the same; that said respondents have brought to the city of Hammond a number of thugs and prize-fighters, who constitute what is known as the 'wrecking crew'; that said respondents are acting in concert with said 'wrecking crew' in the city of Hammond, and are daily pointing out to some member of said 'wrecking crew' one or more of your petitioner's employés, and are directing said 'wrecking crew,' or some member thereof, to brutally assault and beat the employé or employés so pointed out; that the city of Hammond is within a very short distance from the line dividing the State of Indiana from the State of Illinois, and that the members of said 'wrecking crew' (who are all strangers in and about the city of Hammond, and therefore cannot be easily identified) have assaulted and beaten, and are continuing to assault and beat, your petitioner's employés, under the orders and direction of said respondents, and immediately cross over the State line, or seek refuge in the woods surrounding your petitioner's factory; that it is impossible for your petitioner to set out in detail the daily violations of said restraining order, committed by the numerous defendants named in said bill of complaint, and their confederates by reason of the secrecy and swiftness with which they do their unlawful work and disappear across the State line, or in the neighboring woods; but your petitioner represents and informs the court that said respondents are openly acting as the leaders and advisers of the defendants so violating said restraining order, and are especially acting as the leaders and directors of said 'wrecking crew' in their brutal assaults upon your petitioner's employés, as hereinafter more specifically set forth.

5

"That Harry Alting, one of the respondents, in combination with said other respondents, has formed a general conspiracy and plan of campaign by which he and his associates are endeavoring to destroy complainant's property and business, and to force complainant's employés to quit and abandon its service, and in pursuance of such conspiracy and plan of campaign, said Harry Alting, together with the respondents and others, are holding secret meetings in the city of Hammond, and have designated numerous other persons called 'committees' to visit the homes of petitioner's employés for the purpose of terrorizing such employés and the members of their families and thereby compel them to quit the petitioner's service; and that said Harry Alting, and the other respondents, have hired a number of thugs and prize-fighters of Chicago to go to Hammond to assault, beat and terrorize petitioner's employés, and ever since the issuance of the restraining order up to the present time a large number of such thugs and prize-fighters, known as the 'wrecking crew,' have been and are in the city of Hammond and

6

acting directly under the control and command of said Harry Alting and his corespondents, or some of them, in the perpetration of brutalities.

"That Harry Alting, E. W. Tatum, and the other respondents, have organized and are conducting a system of picketing in and by which bands of men are designated and charged with the duty of watching each and every railway train entering the city of Hammond, for the purpose of meeting all persons coming to the city of Hammond seeking employment in petitioner's factory, and such band have met all, or nearly all, of such persons so seeking employment and have threatened them with bodily harm if they entered into petitioner's service or did work in his factory, and in a number of instances have carried such threats into execution; and said pickets are now patrolling the principal streets and private and public paths in the city of Hammond and stopping, interfering with, persons going to and coming from petitioner's factory; and that other bands of such pickets, acting under the orders and directions of said Alting, Tatum, and the other respondents, are picketing about petitioner's plant and factory, so that it is difficult for any
7 one entering or leaving said factory to do so without encountering such pickets and being stopped by them and frequently threatened and insulted and plied with vile and indecent epithets so loathsome that decency forbids their incorporation in the petition.

"That said 'wrecking crew' and some of the respondents herein and their confederates have from time to time designated certain bands of men to visit petitioner's employés at their homes, who deliberately entered such dwelling places and imperiously summoned such employés to appear before such bands in some saloon in the city of Hammond; and on or about September 2, 1901, D. R. Huntington, one of petitioner's employés, was so summoned in the night-time to appear at a saloon in the city of Hammond, and was then and there surrounded by Edward Bessette and others of the respondents, who informed said Huntington that they would give him his choice of either quitting his employment with petitioner, or having 'his head knocked off of his shoulders;' and said Huntington, being in mortal fear that such threats would be carried out, was coerced to quit, and did then and there, by reason of such threats, quit petitioner's service; that Edward Bessette and the others, acting in concert with some of the other respondents and a large number of other persons, held daily meetings; that bands or committees of men visited the homes of petitioner's employés and by like means as those in the case of Huntington, coerced and forced such employés to leave petitioner's service."

Upon the filing of the petition, the respondents therein, including Edward Bessette, were ordered to appear before the court and show cause why they and each of them should not be punished for contempt for violation of the restraining order, as aforesaid.
8 Bessette appeared to the order and filed his answer to the charges, and upon trial the court found him guilty of a contempt of court, as charged in the petition, and imposed a fine of two hundred and fifty dollars, payable to the United States, and the

costs of proceedings against him. From this order or judgment of the court Edward E. Bessette prayed an appeal to the circuit court of appeals, which was allowed by the court below.

The questions of law upon which this court desires the advice and instruction of the Supreme Court are:

First. Whether the circuit court of appeals has jurisdiction to review an order or judgment of a circuit court of the United States, finding a person guilty of contempt for violation of an order of that court and imposing a fine for the contempt.

Second. Whether the "act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved March 3rd, 1891 (26 Stat. 826), authorizes a review by a circuit court of appeals of a judgment or order of a circuit court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that court made in such suit, and imposing a fine for such contempt.

Third. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the circuit court of appeals by appeal.

9 Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the circuit court of appeals by writ of error.

These questions the court this day orders certified and submitted to the Supreme Court of the United States for its proper decision.

JAS. G. JENKINS.
P. S. GROSSCUP.
WM. H. SEAMAN.

Chicago, June 11th, 1902.

Filed Jun- 11, 1902.

EDWARD M. HOLLOWAY, *Clerk.*

10 [Endorsed:] United States circuit court of appeals for the seventh circuit. Edward E. Bessette *vs.* W. B. Conkey Company. Certificate.

Endorsed on cover: (Certificate.) File No. 18,690. U. S. C. C. of appeals, 7th circuit. Term No. 462. Edward E. Bessette *vs.* W. B. Conkey Company. Filed October 13th, 1902.

No. 1460. 142 1253

Brf. of Rooker for Appellant.

Office Supreme Court U.S.
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Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

Filed Oct. 13, 1902.

OCTOBER TERM, A. D. 1902.

No. 1460 142

EDWARD E. BESSETTE,
Appellant,

vs.

W. B. CONKEY COMPANY,
Appellee.

APPELLANT'S BRIEF.

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

Burford Print. Indianapolis.

12540

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No._____.

EDWARD E. BESSETTE,
Appellant,
vs.
W. B. CONKEY COMPANY,
Appellee.

APPELLANT'S BRIEF.

I.

STATEMENT OF THE CASE.

This cause comes here on the certificate of the United States Circuit Court of Appeals for the Seventh Circuit. The questions of law upon which the Court of Appeals desires the advice and instruction of the Supreme Court are as follows:

"First: Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of a Circuit Court of the United

States, finding a person guilty of contempt for violation of an order of that court and imposing a fine for the contempt.

"Second: Whether the 'act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes,' approved March 3, 1891 (26 Stat. 826), authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that court made in such suit, and imposing a fine for such contempt.

"Third: Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

"Fourth: Whether, if such review be sanctioned, by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error."

The appellant, Edward E. Bessette, respectfully asks this Honorable Court to consider the merits of the cause, as well as the questions of procedure. He affirms his entire innocence of any wrong doing and asserts that his appeal fairly presents these questions involving the liberty and rights of a citizen, viz.:

1. May a man who is entirely innocent of any wrong doing be denied the right of an Appellate Court's review of his conviction, solely because the method of his conviction was under the guise of a proceeding to punish for contempt?

2. May a man charged with and tried for one offense be convicted of and punished for a different offense, in one and the same proceeding?

These questions arise upon the appeal of Edward E. Bessette from a judgment of the United States Circuit Court for the District of Indiana, convicting Bessette of the contemptuous violation of a restraining order and fining him two hundred and fifty dollars.

Bessette was a citizen and resident of Illinois and was not a party to the restraining order, which he was charged with having violated.

On August 24, 1901, the W. B. Conkey Company, an Illinois corporation, filed its bill of complaint against J. Ackerman, Harry Alting, W. Armstrong, R. Barker, E. Bohaman, J. Brookover, J. Burns, James Burns, Arthur Chalmers, G. Collins, Gus Collins, John W. Davis, John DeRyke, James Doyle, John Dunlavey, L. Eckerman, J. Eldridge, Jerry Eldridge, L. Florence, Louis Florence, F. Foker, Floyd Foker, H. French, John F. Geckler, F. Grose, S. G. Grose, Charles Hagle, G. Hagle, F. Hart, Frank Hart, A. Heldman, C. Hipp, James Hoag, John Hoag, Theodore Hoberg, F. Hobery, A. Hock, John Holby, A. Holke, A. Hunt, W. Huston, G. Kling, O. Kohlstedt, W. Lamborn, W. Lloyd, L. J. Lockwood, George Long, E. Mason, Roy Mason, C. McCauley, F. McHugh, E. McKibben, M. Moyer, H. Olney, G. Pletcher, J. Rice, B. Rose, James A. Russell, William Rutz, I. J. Snyder, W. Sprik, G. Stackpole, F. C. Thorpe, G. Wangeman, J. Wayle, George Weisbacker, Ed Wells, Ed Wheed (alias Snitzer), R. Whitehead, Robert Whitehead, W. Whittaker, H. Wiley, Hugh Wiley, E. Wright, E. A. Wright, Kent Young, F. Yount. (Record, p. 2.)

The bill averred that the defendants were citizens and residents of Indiana. This averment was duly challenged on the ground that it was fraudulently made to give the court a jurisdiction to which it was not by law entitled. Of the seventy-seven defendants named in the bill, the marshal's return to the writ of subpoena shows that only ten were served with process, as follows: James A. Russell, J. S. Gross, John F. Geckler, Harry Alting, William Rutz, A. Hock, H. Olney, E. A. Wright, Ed Wheed (alias Snitzer) and Ed Wells. *Sixty-seven of the defendants were not served, and the marshal, in his return, stated that these sixty-seven were not served*

upon instructions from the plaintiff's attorneys. (Record, page 30.)

The bill further averred that the complainant had an office at Chicago, Illinois; that it had a factory at Hammond, Indiana, with the operation of which the defendants were unlawfully interfering. The fourth article of the bill was as follows:

"That your orator's factory is located in the outskirts of the city of Hammond and more than two miles distant from the residence portion of said city; that the streets and highways in the vicinity of said factory are not inhabited, or occupied as residences, or otherwise, and are not illuminated at dusk or at nighttime; that there are no factories, business houses or industries whatever located at, near or in the neighborhood or vicinity of said factory, and that there are not to exceed fifteen houses within a radius of one mile; that the streets and highways leading to said factory are chiefly, if not entirely, traveled by the people employed therein, who use the same in going to and from their homes and to and from said factory; that nearly all of your orator's employes have their homes and dwell in the city of Hammond, and when their daily work is done are compelled to go from the factory to their homes through lonely streets, roads and deserted places, which afford them no shelter or protection against sudden and unexpected attacks or assaults on the part of the defendants herein; that your orator's employes are peaceable, civil, industrious and well-behaved, and are not, and especially the women so employed, able to protect themselves against the assaults, intimidation, force, violence and threats employed by the defendants, as hereinafter set forth; nor are they willing to take the risks and hazards incident thereto, and that by reason thereof, if your orator is unable to protect said employes, they will quit, and are now quitting, its service." (Record, page 4.)

It was averred that on the 15th of August, 1901, the plaintiff was engaged in performing numerous contracts, whose terms are generally stated (Record, page 5), and the necessity for skilled labor was set forth. (Record, page 6.) It was averred that on or about said 15th day of August, the plaintiff was obliged to discharge the de-

fendant, Harry Alting, and a controversy with him was stated. (Record, page 6, Art. 7.) It was averred that when the plaintiff refused to reinstate Alting he made threats. An effort on the part of Alting to carry out his threats was described in the eighth article as follows:

"That said Harry Alting then and there proceeded to carry out and did, so far as he has been able to do, carry out and execute his said threats, *and in pursuance of such purpose and design, did then and there conspire and confederate with divers irresponsible persons residing in the city of Hammond* (but whose names are unknown to your orator, and who are not employed in, or in any wise connected with, or interested in your orator's factory, or business), to carry out, and did then and there, *acting in concert with said divers irresponsible persons,* by the use of force, threats and violence, cause thirty-eight of your orator's employes to quit your orator's service, on or about the 19th day of August, A. D. 1901; that said thirty-eight employes have now joined in said conspiracy with said Harry Alting *and his said confederates,* and have conspired and confederated with and are now conspiring, confederating with and acting in concert with said Harry Alting and his confederates, and with each other, to maliciously injure your orator, to break and mutilate its machinery located in said factory, to damage and destroy its products, and to cripple, injure and destroy its factory and business and to compel by threats, force and violence your orator's other employes to quit its service, and by an organized and concerted effort, and by the use of threats, force and violence, to prevent other persons from filling the places in your orator's service of those who have quit, or may hereafter quit its service; that said thirty-eight employes are by proper names made parties defendant to this bill of complaint." (Record, page 7, Art. 8.)

It was further averred that said Alting and said thirty-eight workmen were demanding reinstatement, and the impossibility of the plaintiff's complying with that demand was set forth in Article 9. The tenth article was given to the exculpation of the plaintiff, as follows:

"That your orator has no trouble or controversy, or difference with its employes concerning wages, or hours of work, or any other matter concerning their welfare and comfort; that all its employes except the defendants are satisfied and contented, and are desirous of remaining in your orator's service, and would and will continue therein, unless they are compelled to quit such service by reason of the force, threats, intimidation and violence practiced and pursued by the defendants and their said confederates; that many of your orator's employes have stated to its officers that unless your orator is able to, and will, afford them protection against such threats, violence and intimidation, they will be compelled to quit your orator's service and seek work elsewhere, and that many of said employes, by reason of such threats, force and violence and intimidation, are about to quit your orator's service, and that if said employes do so quit it will be extremely difficult to fill their places by reason of the fact that the city of Hammond is not a labor center, but more especially by reason of the fact that the defendants, acting in concert, are now actually engaged, by the use of threats, intimidation, violence and force, in compelling workmen, whose services have been secured by your orator to fill the places of said defendants, to refuse to enter your orator's factory and service, and that by reason of such threats, intimidation, force and violence your orator is unable to secure the services of other employes to fill the places left vacant by said conspiring defendants, and will continue to be unable to secure other employes, unless the defendants herein are restrained and enjoined as hereinafter prayed." (Record, page 9.)

It was averred that numerous persons who would ordinarily seek to do business with the plaintiff at its factory were deterred by fears of violence, and that the public authorities of the city of Hammond had refused to afford the necessary protection. (Record, page 9, Art. 11.)

It was averred that the defendants and the many hundreds of others confederating with them were insolvent; that the names of those confederating were unknown to the plaintiff, but leave was asked to make them parties to the bill and to charge them with apt

words when their names and identity should become known. (Equity Rule 57; Desty's Fed. Proc., page 1172, and cases cited.) The methods resorted to by the defendants and their confederates were further described in Article 14, as follows:

"That the defendants and their confederates, in carrying out their said conspiracy to destroy your orator's factory and wreck its business, act in large bodies, and not singly or in small squads; that said large bodies have been and are surrounding your orator's factory, and are patrolling the public highways and streets leading to said factory, and obstructing the same, and are assaulting your orator's employes with great physical violence and inflicting physical injuries upon such employes as they pass in and out of said factory, going to their work and returning to their homes; that the defendants and their confederates are watching the street cars and other conveyances running to and from said factory, and are lying in wait to threaten, terrorize and intimidate, and do threaten, terrorize, intimidate and assault, all persons carried by said street cars and other conveyances who seek employment in your orator's factory, or who wish to visit the same for the purpose of transacting business with your orator." (Record, pages 10-11.)

The damages sustained by the plaintiff were set forth in Article 15. (Record, page 11.)

The sixteenth article was a statement of unlawful acts on the part of the defendants, and it included the following:

"Your orator further shows that for many days last past said defendants and their confederates, acting in concert, have been and now are and will continue maliciously to patrol the streets, places and grounds adjoining, and in the immediate neighborhood of your orator's factory, in large groups, continuously using indecent language and vile epithets to the workmen and workwomen now employed in your orator's factory and to all persons seeking employment therein, with the express intention and desire, openly and violently expressed, to prevent your orator from carrying on its said business and from retaining its workmen in its factory and from securing new workmen to fill the places made vacant by said defendants, as herein set forth; that said defendants and their con-

federates have been and now are maintaining such patrol at said places and are by means thereof wilfully and maliciously obstructing and interfering with and intimidating, by the use of threats, force and violence, all persons who desire to visit your orator's factory for the purpose of transacting business, or for the purpose of entering into your orator's service or continuing in such service; and are wilfully and maliciously intimidating and threatening with bodily harm your orator's employes if they shall remain longer in its service, or continue to work at said factory, and are, by wilful and malicious threats of intimidation and violence and by use of violent and abusive language and vile and insulting epithets, endeavoring to cause and force your orator's employes to leave and quit its service and abandon their work in said factory; and that said defendants and their confederates have since the 15th day of August, A. D. 1901, and are now endeavoring, by the use of the means herein set forth and by publishing and circulating divers false and malicious reports of and concerning your orator and its said factory and business, and especially of and concerning the 500 or more women who are employed in said factory, to injure your orator's said business and to prevent your orator from continuing to carry on the same; that said defendants and their confederates have been and are now maintaining, by such patrols and pickets and by congregating in large bodies and conducting themselves in such a riotous and insulting way and manner, and by the use of such force and violence, a nuisance and obstruction to the public highway and public grounds at, near or in the neighborhood and adjacent to said factory, and a nuisance to your orator, to its real estate and factory located thereon, all to your orator's great injury, loss and damage." (Record, pages 11-12.)

THE SPECIFIC RELIEF PRAYED FOR IN THE BILL.

The prayer for relief includes that the defendants make answer, but not under oath, and that they, "and each of them and their confederates, and each and every of the servants, agents of the said defendants, and each of them, and any and all persons aiding and abetting said defendants, or any, or either of them, and all persons, now or hereafter, aiding and abetting said defendants, or any, or

either of them, and all persons, now or hereafter, confederating with or acting in concert with said defendants, or any or either of them, or their servants or agents, be restrained and enjoined from in any manner interfering with, hindering, obstructing or stopping any of the business of the plaintiff, or its agents, servants or employes in the operation of the factory and business of the plaintiff at Hammond, Indiana, or elsewhere, and also from entering upon the grounds, factory or premises of the plaintiff at Hammond or elsewhere, for the purpose of interfering with, hindering or obstructing the business of the plaintiff in any form or manner whatsoever, and also from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence, any of the employes of the plaintiff to leave its service, and, also, from preventing or attempting to prevent any person or persons by threats, intimidation, force or violence from freely entering into the service and employment, or continuing in the service and employment, of the plaintiff, and, also, from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence, the plaintiff, against its will or the will of its officers, employing or discharging any person whomsoever, and, also, from doing any act whatever in furtherance of any conspiracy or combination to restrain or obstruct either the plaintiff or any of its officers or employes in the free and uninterrupted and unhindered control and direction of the plaintiff's business and affairs, and, also, from ordering, directing, aiding, assisting or abetting in any manner whatsoever the commission of any or either of the acts aforesaid." (Record, pages 12-13.)

The prayer further asked relief upon these terms: "That the defendants be enjoined and restrained from congregating or being upon or about the sidewalks, streets, alleys, approaches or places

adjoining, or adjacent to, the factory and premises of the plaintiff at Hammond, or upon or about the factory or the grounds belonging to or used in connection therewith, for the purpose of intimidating or coercing the employes or preventing them from rendering their services or discharging their duties to the plaintiff, and from inducing or coercing, by threats, force or violence, any employe to leave the service or employment of the plaintiff, and from in any manner interfering with the plaintiff in carrying on its said business in the usual and ordinary way, and from in any manner interfering with or molesting any person or persons who may be employed or seeking employment with the plaintiff; that they be restrained and forbidden, either singly or in combination with others, from collecting in or about the approaches to the plaintiff's factory and buildings for the purpose of picketing or patrolling or guarding the streets, avenues, gates or approaches to the factory of the plaintiff, for the purpose of intimidating, threatening or coercing any employe or person, or persons, seeking employment with plaintiff, and from interfering with any employe in going to and from his daily work at the factory of plaintiff, and from going to the homes of the employes of the plaintiff for the purpose of intimidating or coercing any of them to leave the service or not to enter the service of the plaintiff." (Record, pages 13-14.)

The bill asked that the injunction be made perpetual, and that a restraining order be issued temporarily, and it prayed for a writ of subpoena. The bill was verified by Alfred Edwin Wilcox, on behalf of the plaintiff. (Record, page 15.)

Affidavits in support of the bill appear in the record (pages 16-28), made by Ernest H. Colvin, James Conkey, Anthony Warnimont, Mrs. Millie Holby, wife of the defendant, John Holby; Clayton C. Blass, Theodore F. Conkey, Harry J. Bender, Frank Kitzelman, Emma Schultz and Dana R. Hunt.

THE TEMPORARY RESTRAINING ORDER WHICH BESSETTE WAS CHARGED WITH HAVING VIOLATED.

On the 24th of August the Honorable John H. Baker, Judge, issued from the United States Circuit Court for the District of Indiana, a temporary restraining order, addressed to each of the above named defendants, and also to one L. J. Rockwood, and to "their confederates and each and every of the servants, agents of said defendants, and each of them, and any and all persons aiding and abetting said defendants, or any or either of them, and all persons now or hereafter aiding and abetting said defendants, or any or either of them, and all persons now or hereafter confederating with or acting with said defendants, or any or either of them, or their servants or agents." (Record, page 31.)

By the terms of the order the parties mentioned were restrained and enjoined—

(1) "From in any manner interfering with, hindering, obstructing or stopping any of the business of the plaintiff or its agents, servants or employes in the operation of the factory or business at Hammond or elsewhere;

(2) And from entering upon the grounds, factory or premises of the plaintiff, at Hammond or elsewhere, for the purpose of interfering with, hindering or obstructing the business of the plaintiff in any manner whatsoever;

(3) And from compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force or violence, any of the employes of the plaintiff to refuse or fail to do their work or discharge their duties as such employes of the plaintiff;

(4) And from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence, any employe to leave the service of the plaintiff;

(5) And from preventing, or attempting to prevent, any person, by threats, intimidation, force or violence, from freely entering into or continuing in the service of the plaintiff;

(6) And from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence, the plaintiff from employing or discharging any person, and also from doing any act whatever in the furtherance of any conspiracy or combination to restrain or obstruct the plaintiff, or any of its officers or employes, in the free, uninterrupted and unhindered control or direction of the business and affairs of the plaintiff;

(7) And from ordering, directing, aiding, assisting, or abetting in any manner whatsoever, any person, or persons, to commit any or either of the acts aforesaid." (Record, pages 31-32.)

The restraining order then proceeds, *omitting all reference whatever to any confederate, agent, servant, or other person whomsoever, except "the said defendants,"* as follows:

"And that the said defendants, and each and all of them, be, and they are, and each of them is hereby, enjoined and restrained from congregating, or being upon or about the sidewalks, streets, alleys, approaches or places adjoining or adjacent to said factory and the premises of said complainant in the city of Hammond, or upon or about said factory or the grounds belonging to the same or used in connection therewith, for the purpose of intimidating the employes of said W. B. Conkey Company, or coercing said employes or any of its officers or agents, or preventing them, or any of them, from rendering their services or discharging their duties to said W. B. Conkey Company; and also from inducing or coercing, by threats, force or violence, any employes of said W. B. Conkey Company to leave the service or employment of said W. B. Conkey Company; and also from in any manner interfering with or molesting any person or persons who may be employed by, or who may be seeking employment with, said W. B. Conkey Company in the operation of its said factory and business; and also from in any manner interfering with said W. B. Conkey Company in carrying on its business in its usual and ordinary way.

"And that the said defendants, and each and all of them, be and they are, and each of them is, hereby restrained and forbidden, either singly or in combination with others, from collecting in and about the approaches to the factory and buildings of said W. B. Conkey Company for the purpose of picketing or patrolling or guarding the streets, avenues, gates and approaches to the property of the said W. B. Conkey Company, for the purpose of intimidating, threatening or coercing any of the employes of said W. B. Conkey Company, or any person or persons seeking employment with said W. B. Conkey Company; and also from interfering with the employes of said W. B. Conkey Company in going to and from their daily work at said factory of the complainant, W. B. Conkey Company.

"And that *said defendants, and each and all of them be, and they are, and each of them is hereby enjoined and restrained* from going, either singly or collectively, to the house of the employes of said W. B. Conkey Company, or any or either of them, for the purpose of intimidating or coercing any and all of said employes to leave the employment or service of said W. B. Conkey Company, or from entering into the employment or service of said W. B. Conkey Company, and, as well, from intimidating or threatening, in any manner, the wives and families of said employes, at their said homes or elsewhere." (Record, pages 32-33.)

SERVICE OF THE RESTRAINING ORDER ON CERTAIN OF THE DEFENDANTS.

The restraining order was issued on August 24th, and was served upon the following persons: Harry Alting, W. Armstrong, J. Brookover, James Burns, Arthur Chalmers, Gus Collins, John Dunlavey, John W. Davis, James Doyle, S. Grose, John F. Geckler, James Hoag, Frank Hart, Theodore Hoberg, John Hoag, C. Hipp, O. Holke, A. Heldman, A. Hock, G. Kling, W. Lloyd, F. McHugh, Roy Mason, M. Moyer, E. Mason, H. Olney, James A. Russell, William Rutz, L. J. Rockwood, J. Rice, W. Sprik, I. J. Snyder, C. Stackpole, F. C. Thorpe, C. Wangeman, E. A. Wright, Hugh Wiley, R. Whitehead, Ed Wells, Ed Wheed (alias Snitzer) and Kent Young.

Each of the above named persons, except L. J. Rockwood, was named as a defendant in the bill, but as to the following of them the writ of subpoena had not been served, because the plaintiff's counsel had directed otherwise: W. Armstrong, J. Bookover, James Burns, Arthur Chalmers, Gus Collins, John Dunlavey, John W. Davis, James Doyle, James Hoag, Frank Hart, Theodore Hoberg, John Hoag, C. Hipp, O. Holke, A. Heldman, G. Kling, W. Lloyd, F. McHugh, Roy Mason, M. Moyer, E. Mason, J. Rice, W. Sprik, I. J. Snyder, C. Stackpole, F. C. Thorpe, C. Wangeman, Hugh Wiley, R. Whitehead and Kent Young. (Record, page 33.) Of the seventy-seven defendants named in the bill, only ten were served with both the subpoena and the restraining order. The ten thus served were: Harry Alting, S. Grose, John F. Geckler, A. Hook, H. Olney, James A. Russell, Wm. Rutz, E. A. Wright, Ed Wells and Ed Wheed (alias Snitzer).

PETITION FOR A CITATION AGAINST BESSETTE AND OTHERS.

On the 13th day of September, 1901, "the following further *proceedings in the above entitled cause* were had, to-wit: Comes now the complainant, by its solicitors, and files its verified petition," showing the filing (Record, page 34), of the bill on August 24. This petition averred that the Court "did enter of record in said cause a certain restraining order in accordance with the prayer of said bill of complaint, and made the same returnable on the second day of October, A. D. 1901." (Record, page 35, Article 2.) It averred that the bill prayed "for an injunction and restraining order to enjoin and restrain said defendants and said unknown persons—

"(1) From obstructing and interfering with the business and property of your petitioner, and from in any manner interfering

with, hindering, obstructing or stopping any of the business of your petitioner or its agents, servants or employes in the operation of its factory and business in said Hammond, or elsewhere;

"(2) And from entering upon its grounds, factory or premises, located in said city of Hammond, for the purpose of interfering with, hindering or obstructing your petitioner's business in any manner whatsoever;

"(3) And, also, from compelling or inducing, or attempting to compel or induce, by threats, intimidation, persuasion, force or violence, any of your petitioner's employes to refuse or fail to do their work or discharge their duties as such employes;

"(4) And, also, from compelling or inducing, or attempting to compel or induce, by threats, intimidation, force or violence, any one from freely entering into the service and employment, or continuing in the service and employment, of your petitioner." The petitioner refers to the bill for greater accuracy. (Record, page 35, Art. 1.)

The petition recited the publication of features of the restraining order in newspapers in Chicago and in Hammond, and the circulation of it by posters and otherwise in and about Hammond. The sixth article (Record, page 37,) named six defendants, viz: Alting, Rutz, Collins, Hoberg, Hoek and Dunlavey, as having been served with the restraining order. It charged that others named, including Charles Johnson, Martin Cunningham and Harry Morrison, "who are defendants to said bill of complaint [an averment wholly false, as the record discloses] who are residents of said city of Hammond, had actual notice and knowledge of the text, scope, purpose and office of said restraining order as early as August 26, A. D. 1891; that J. W. Henning, Edward Bessette, Timothy O'Brien, Patrick Gross, John S. Sugrue, E. W. Tatum, James Kase, Frank Valla, Frank Gillinger, Frank Stavic, William Volkman, ——— Colbert, ——— Sievers and John C. Harding, who are not defendants by name to said bill of complaint, but who have been and now are conspiring and confederating with said defend-

ants to do things prohibited by said restraining order, had actual notice and knowledge of the text, scope, purpose and office of said restraining order at the time of the happening of the occurrences hereinafter set forth, and in which occurrences they participated." (Record, page 37, Art. 6.)

In Article 7, Bessette and the others named, "who are hereby made respondents to this petition, are now in contempt of this Court and have on numerous occasions knowingly and deliberately violated said restraining order in the manner hereinafter more particularly set forth." (Record, page 37.)

Article 8 told about an alleged "wrecking crew" and its depredations, but it gave neither a name nor a place nor a definite circumstance. Nor did it refer to any affidavit whereby any name, place or circumstance might be fixed or ascertained. Mr. Bessette's name was not mentioned. (Record, pages 37-38.)

Article 9 made general averments concerning an alleged "wrecking crew," but it mentioned no date or place, or any circumstance, and the only name given was that of Harry Alting, who "*before and after* the issuance of said restraining order repeatedly threatened to force your petitioner's employes to quit and abandon its service." The use of the "wrecking crew" was again mentioned in connection with harassing and terrorizing "your petitioner's employes, etc." Mr. Bessette's name was not mentioned. (Record, pages 38-39.)

Article 10 described a system of picketing organized and maintained by Harry Alting, E. W. Tatum and others. It averred that these pickets were watching the railway trains coming into the city of Hammond. [This is the first appearance anywhere in the record of the railway station at Hammond. There was no complaint of nor injunction against committees of workmen being at

the station, which is approximately a mile and a half from Conkey's plant.] The first averment of facts tending to show a violation of the restraining order appeared at the close of Article 10, as follows: "That other bands of such pickets, acting under the orders and directions of Harry Alting, E. W. Tatum and the other respondents herein, are picketed about your petitioner's plant and factory, so that it is difficult for any one entering or leaving said factory to do so without encountering such pickets and being stopped by them and frequently threatened and insulted and plied with vile and indecent epithets, so loathsome that decency forbids their incorporation in this petition, and at other times actually assaulted and beaten by such pickets." [The evidence demonstrates that this particular averment is false, or, at least, that it is not sustained by any evidence.] Mr. Bessette's name was not mentioned. (Record, page 40, at conclusion of Art. 10.)

Article 11 stated a colloquy between Harry Alting and Jacob Engle, in which Alting made threats, Engle being at the time on his way to plaintiff's factory, seeking work. The date was September 5, but the place was not mentioned. (Record, page 40.)

Article 12 related to threats made September 10 by Harry Alting, John Dunlavey, John S. Sugrue, A. Hoek, William Rutz, Jerry Eldridge, Patrick Gross, E. A. Wright, Harry Morrison and the "wrecking crew" against the plaintiff's employes, Jacob Engle and Maximillian Kieser, on their way from their work to their homes. Mr. Bessette's name was not mentioned. (Record, page 41.)

In Article 13 William Rutz was alleged to have assaulted John C. Hammer and Fred Forshawll, employes "of your petitioner," on September 4. Mr. Bessette's name was not mentioned. (Record, page 41.)

Article 14 averred that on August 30 Gus Collins secretly aided and assisted J. W. Henning in assaulting and beating John B. Horton and Charles Minger, employes "in your petitioner's factory;" that Horton and Minger were assaulted on August 29, 30 and 31; that Henning was arrested; that he was visited at the police station by Theodore Hoberg, A. E. Wright and others, who sought to procure bail; that Horton was offered twenty-five dollars if he would leave Hammond and not prosecute Henning, but the offer was rejected. Mr. Bessette's name was not mentioned. (Record, pages 41-42.)

Article 15 charged Theodore Hoberg with activity in picketing "your petitioner's factory," but no dates or names were given. Mr. Bessette's name was not mentioned. (Record, page 42.)

Article 16 averred that John Dunlavey and John Ackerman, on September 3, met Annie Ruple, Annie Gherke, Lena Ruple and Mollie Rutz "at or near the Erie railroad tracks, in the city of Hammond, in a pathway leading through the woods," and used toward the girls vile language, accompanied with threats. Mr. Bessette's name was not mentioned. (Record, page 42.)

Article 17 charged that John Dunlavey had threatened a large number of "your petitioner's employes" and that he assaulted Jacob Engle, an employe returning to his home from work. Mr. Bessette's name was not mentioned. (Record, page 43.)

Article 18 averred that Charles Johnson, William Rutz, James Kase and Frank Valla, on August 26, entered the house of James P. Waters, one of "your petitioner's employes," and attempted, by threats, to force him "to quit your petitioner's service." Mr. Bessette's name was not mentioned. (Record, page 43.)

Article 19 charged that on August 31 Charles Johnson, Frank Gillinger, Frank Stavie and William Volkman thrashed Fred F.

Wilkinson, "an employe of your petitioner." Mr. Bessette's name was not mentioned. (Record, page 43.)

Article 20 said that Martin Cunningham had made various threats against Fred Decharme, "one of your petitioner's employes," beginning August 27. Mr. Bessette's name was not mentioned. (Record, page 43.)

Article 21 averred that E. W. Tatum, a resident of Chicago, opened headquarters in Hammond, whence he directed picketing, and in conjunction with Alting directed the "wrecking crew." Mr. Bessette's name was not mentioned. (Record, page 44.)

Article 22 pertains to the appellant Bessette, and was as follows:

"That said 'wrecking crew' and some of the respondents herein and their confederates, whose names are unknown to your petitioner, have, from time to time, and are now designating certain bands of men to visit your petitioner's employes at their homes, against the will and wish of such employes; that said bands, without any process or writ, or invitation whatever, deliberately enter the dwelling places and boarding houses of your petitioner's employes, and imperiously summon such employe to appear before said bands in some saloon, or like place, in the city of Hammond; that on or about the 2d day of September, A. D. 1901, three persons, whose names are unknown to your petitioner, entered the bedroom of D. R. Huntington, one of your petitioner's employes, after said Huntington had retired to his bed for the night, and commanded said Huntington to forthwith rise and dress himself and appear before some band or crowd of persons named by said three uninvited visitors; that said Huntington then and there, being in actual fear of his life, did dress himself, in obedience to said command, and was taken by said three persons to a saloon located in the city of Hammond, the name of which is unknown to your petitioner and unknown to said Huntington; that said Huntington was then and there surrounded by Ed Bessette, Timothy O'Brien, John C. Harding and one —— Colbert and one —— Sievers, respondents herein; that said Bessette, O'Brien, Harding, Colbert and Sievers were never employed in, or in any wise connected with your petitioner's business, and, as your petitioner is informed and believes,

are residents of the city of Chicago; that said Bessette, O'Brien, Harding, Colbert and Sievers then and there boldly informed said Huntington that they would give him his choice of either quitting the employment of your petitioner or having "his head knocked off his shoulders," and said Huntington, being then and there in mortal fear that such threats would be carried out, was coerced to quit, and did then and there, solely by reason of such threats, quit your petitioner's service; that said Edward Bessette, Timothy O'Brien and E. W. Tatum, acting in concert with some of the other respondents and a large number of persons, whose names are unknown to your petitioner, did hold meetings daily of bands, or committees of men, the members of which are unknown to your petitioner; that said bands, or committees, visited the homes of your petitioner's employes, and by like means as the means employed in the case of D. R. Huntington, as hereinbefore set forth, coerced and forced your petitioner's employes to leave its service." (Record, pages 44-45.)

The affidavit of Huntington was filed in support of Article 22. (Record, pages 66-68.) Huntington also testified at the trial. (Record, pages 203-223.)

Article 23 summarized and construed the petition, and for as much as it established the theory of the proceeding, whereby its character was fixed, the accused advised as to the legal nature of the charge against him and the law controlling it was determined, the article is reproduced, as follows:

"That said respondents have, almost daily since the issuance of said restraining order, done, and are now doing, the following things, in violation of the letter and spirit of said restraining order, viz.:

"Have interfered with, hindered and obstructed, and are now interfering with, hindering and obstructing the business of your petitioner and its agents, servants and employes in the operation of your petitioner's factory and business; and have entered upon the premises of your petitioner for the purpose of interfering with, hindering and obstructing its business and affairs;

"And have, by means of threats, intimidations, persuasion, force and violence, attempted to compel and induce your petitioner's em-

ployes to refuse or to fail to do their work or discharge their duties as such employes, and to compel and induce such employes to leave your petitioner's service;

"And have prevented, or attempted to prevent, divers persons, by means of threats, intimidation, force and violence, from freely entering into the service or employment, or continuing in the service or employment of your petitioner, and have attempted to interfere with and hinder your petitioner in the free control and direction of its business and affairs;

"And have congregated in, upon and about the sidewalks, streets, alleys, approaches and places adjoining and adjacent to your petitioner's factory and buildings, for the purpose of intimidating its employes and for the purpose of preventing such employes from rendering their services or discharging their duties under such employment as such employes;

"And have, by threats, force and violence, induced and coerced a number of your petitioner's employes to leave its service, and have in divers ways interfered with and molested your petitioner's employes and other persons seeking employment in your petitioner's factory;

"And have, both singly and collectively, visited the homes of your petitioner's employes, or some of them, for the purpose of intimidating and coercing such employes to quit your petitioner's service, and in some instances have succeeded in so doing;

"And have congregated and collected in and about the approaches to your petitioner's factory and buildings, for the purpose of picketing, patrolling and guarding the streets, alleys and approaches to your petitioner's factory and buildings, for the purpose of intimidating, threatening and coercing your petitioner's employes and persons seeking employment with your petitioner, and have intimidated, threatened and coerced such employes and such persons seeking employment;

"And have employed said 'wrecking crew' and other persons, whose names are unknown to your petitioner, to aid and assist them in violating the letter and spirit of said restraining order, as herein set forth." (Record, pages 45-46.)

Article 24 concluded that the parties named in "the petition" were in contempt of court "for the wilful and repeated *violation and violations of said restraining order,* and its several terms and

provisions, as hereinbefore specifically set forth, and that said respondents, and each of them, threaten to continue *to violate and will violate said restraining order* and each of its terms and provisions. Wherefore your petitioner respectfully requests this Court, that in consideration of the *violation and violations of said restraining order* by said respondents, and each of them, as hereinbefore set forth, it will issue a writ of attachment, etc. (Record, pages 46-47.)

The petition was subscribed "W. B. Conkey Company, by Alfred E. Wilcox, general manager." And Wilcox made the verification before J. G. Ibach, a Notary Public and a lawyer in interest. (Record, pages 47-48.)

THE SUPPLEMENTAL RECORDS.

In the petition for attachment *the restraining order was not set forth* either in *haec verba* or in substance, and the sole information as to its context was by reference to the suit in chancery, as follows:

"That on the 24th day of August, A. D. 1901, and after said bill of complaint had been so filed, and after due consideration thereof, said Circuit Court did enter of record in said cause a certain restraining order, in accordance with the prayer of said bill of complaint, and made the same returnable on the 2nd day of October, A. D. 1901, to which order, so entered of record, your petitioner begs leave to refer for greater accuracy." (Record, page 35, Art. 2.)

Of the thirty-one affidavits filed in support of the petition, only three mentioned Bessette. D. R. Huntington, Henry P. Boyle and Michael J. Kennedy were the affiants.

Boyle's affidavit mentioned Bessette as one of those who participated in picket work. (Record, page 75.) Various offenses were ascribed to other persons.

Kennedy's affidavit named Bessette as among those who did picket work. (Record, page 78.) Other persons were charged with various offenses.

Huntington's affidavit contained the following charge against Bessette:

"On the 2nd day of September, 1901, I went to my bedroom, and retired between 8:30 and 9 o'clock. After I had gone to bed one F. Stone, in company with two or three others, whose names are not known to me, entered my bedroom without my permission, and talked in a loud and boisterous manner. None of said persons had any right there. Said Stone and others told me, among other things, that I was wanted down town and I should get up and dress. In response to their command I got out of bed, dressed myself, and they took me down town. On the way down they said that they were directed by the committee to take charge of me, and that they proposed to turn me over to the committee, composed of ——— Colbert, Ed Bessette, Tim O'Brien, ——— Sievers and John C. Harding and a number of others, whose names are unknown to me. We went to the committee's headquarters, in a saloon, the name of which I do not know. We arrived at the saloon about 9:30 in the evening; the committee, composed of the men above named and others, took seats around the table and directed me to take a seat. O'Brien then said: 'I tell you, Huntington, you must either take your chance of having your head knocked off your shoulders or you must quit that place.' Bessette said, among other things: 'Huntington, the boys have evil designs on you, but if you will come out we will call the dogs of war off.' The other members of the committee made substantially the same statements. After considering the matter and fearing that my life was in danger, I consented to quit Conkey's place, and I did not return to work at said Conkey's plant the next day." (Record, page 67.)

TERMS OF THE CITATION.

The record recites the order of the Court as follows: "And the complainant also files with its said petition, and in support thereof, the affidavits, thirty-one in number, of Anna Gehrke, Annie Ruppell, Mollie Rutz, Lena Ruppell, J. G. Ibach, Jake Engel, Maxi-

millian Keiser, Chas. Minger, John B. Horton, Wallace Worden, Dana Sommers, James Francis Waters, D. R. Huntington, James F. Waters, Abraham Greenbaum, Joseph N. Humphrey, Daniel J. Sheehan, Sigismund Coln, Frank J. Stewart, Henry P. Bogle, Michael J. Kennedy, Henry Sapp, W. A. Warren, Joe Murray, John D. Hammer and C. F. Wilkinson, and it appearing to the Court from said petition and affidavits that Harry Alting, William Rutz, Gus Collins, Theodore Hoberg, Charles Johnson, John Ackerman, Edward Bessette, E. W. Tatum, John Dunlavey, J. W. Henning and Harry Morrison have contemptuously *violated the restraining order* heretofore made and issued *herein* by this Court. It is now thereupon ordered by the Court that a rule against said persons and each of them, requiring them and each of them to be and appear before this Court, at Indianapolis, on Thursday, the 3rd day of October, A. D. 1901, at 9 o'clock of said a. m., and show cause, if any exists, why they and each of them should not be punished *for the contemptuous violation of said restraining order as aforesaid.*" (Record, pages 84-85.)

The citation was issued in the form of a certified copy of the order of Court. (Record, page 85.) It appears to have been served only on Harry Alting, John Ackerman, Edward Bessette, Harry Morrison and William Rutz by reading; on Gus Collins by copy; on Charles Johnson by his indorsing on the writ the acceptance of service. (Record, page 86.)

BESSETTE'S SPECIAL APPEARANCE AND PLEA TO THE JURISDICTION OF THE COURT.

On September 28 Bessette entered his special appearance to plead to the Court's jurisdiction over him. His verified plea was docketed in the chancery proceedings, as were all the papers throughout the record, and it was in substance as follows:

"Comes now Edward E. Bessette, who is a defendant in the petition for attachment in the cause above entitled, and enters herein his special appearance for the sole purpose of pleading to the jurisdiction of this Honorable Court over him as a defendant in this cause, and so pleading, showeth unto your Honors that he is now and at all times mentioned in the bill of complaint and in the petition for attachment, has been a citizen and resident of the city of Chicago, in the State of Illinois, of which State the said complainant, the W. B. Conkey Company, is and likewise has been a citizen and resident.

"Wherefore, your respondent says that for as much as the matters in controversy, as between said complainant and this respondent, arose wholly between citizens and residents of one and the same State, therefore your Honorable Court has not jurisdiction in the premises, and he asks hence to be discharged." (Record, pages 87-88.)

Bessette's plea to the jurisdiction was overruled on October 3 and he excepted. (Record, page 88.) That ruling of the Court was the first error assigned in this appeal. (Record, page 119.)

On October 3, when the Court overruled Bessette's special plea to the jurisdiction, October 16 was fixed as the time for further proceedings as to him, and October 25 as to the other defendants.

BESSETTE'S VERIFIED ANSWER.

On October 8, Bessette filed his answer under oath, traversing the petition. (Record, pages 89-112.)

In Article 1 of his answer, Bessette challenged the jurisdiction of the Court over the subject matter of the suit in chancery, for that the essential diversity of citizenship did not exist. It was averred that throughout the proceedings John Dunlavey, Ed Wheed (alias Snitzer), John Ackerman, Oscar Kohlstedt, E. McKibben, Wheeler Armstrong and J. Eldridge has been and were citizens and residents of Illinois, and not of Indiana, as the bill charged, and that the averment in the bill that those defendants were citizens

and residents of Indiana had been fraudulently made to induce the Court to take cognizance of the cause. (Record, pages 89-90.) At the trial of the cause the appellant offered in evidence the affidavit of John Dunlavey to sustain this article of the answer, but the Court excluded the evidence offered, and an exception was given. (Record, pages 577-579.) This ruling of the Court is the twenty-second error assigned. (Record, pages 121-122.)

In Articles 2, 3, 4, 5, 6 and 7, of his answer, Bessette denied the charges in the corresponding articles in the petition.

In Article 8, of his answer, Bessette denied responsibility for and knowledge of the existence of a "wrecking crew" and of any acts of violence, etc. He said:

"That as to the matters and things stated and set forth in Article 8 in said petition for attachment, this defendant says that he has no knowledge whatsoever of any act of brutal violence, or of violence in any degree whatsoever, committed or advised against the employes of the petitioner or any of them, or against any person seeking service in the petitioner's factory, or against any person seeking to carry on or to assume any business relationship whatsoever with said petitioner, and he denies that he has any knowledge whatsoever of the insulting or terrorizing of any of said petitioner's employes by the use of violence, threats, indecent language, or in any manner whatsoever, and that he has no knowledge whatsoever of any system of picketing said petitioner's factory, or the highways and paths leading to the same, or the homes of said petitioner's employes, and he denies that he has any knowledge whatsoever that any of such employes, or persons seeking employment in the service of the petitioner, has been or is being terrorized; and he denies that he has ever boasted, in the city of Hammond or elsewhere, that he has read the restraining order made and entered by this Honorable Court in this cause, and that he did not intend to obey and abide by the same; and he denies that he has ever brought or known of the bringing to said city of Hammond of any thugs, prize fighters, or other persons to constitute, and who do constitute, what is known as the 'wrecking crew,' described in said peti-

tion, and this defendant, further answering so much of said article as pertains to said 'wrecking crew,' says that he has ever counseled and advised against any violence on the part of any person in connection with the controversy between said petitioner and the respondents in said cause, and he further says that on occasions when he was in the city of Hammond, as hereinafter more fully stated and set forth, he was approached at intervals by persons who asserted that they were hostile to said W. B. Conkey Company, but whom this defendant believes were in the service and employ of said W. B. Conkey Company, and who sought, from this defendant, to learn his views as to the policy and conduct of said parties in resistance to the W. B. Conkey Company in the premises; that whenever so approached this defendant said to said persons that they must positively abstain from any and every sort of violence, and that they must not in any manner whatsoever molest or assault any of the employes of said W. B. Conkey Company, and this respondent says that he publicly gave it out that if he learned of any misconduct on the part of any member of any labor union, he would take it upon himself to prefer charges of conduct unbecoming a union man against such offending persons in the union to which they belonged. This defendant says that it is, and ever has been, his policy and belief that force, intimidation and violence were detrimental to the cause of labor, and that he stands for, and always has stood for, conciliation and peace and the arbitrament of matters in controversy between employers and their employes; and he denies that he ever acted in concert with any 'wrecking crew' in the city of Hammond or elsewhere, and he denies that he ever pointed out to any member of said 'wrecking crew' any one or more of the employes of said petitioner, and he denies that he ever directed said 'wrecking crew' or any member thereof to assault, beat, or in any manner whatsoever maltreat any employe of said W. B. Conkey Company, and he denies that he has any knowledge whatsoever of the so-called 'wrecking crew,' and he says that if any such 'wrecking crew' existed at the city of Hammond it was created and maintained there by said W. B. Conkey Company for the express purpose of creating trouble and of bringing violence, all to the end that said W. B. Conkey Company might have apparent justification for a complaint to this Court, such as is set forth in said petition for attachment."

In Articles 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, of his answer, Mr. Bessette denied the averments made in the corresponding articles of the petition.

In Article 22, of his answer, Bessette met the charges in the corresponding article of the petition, which related, among other things, to the alleged Huntington episode. Of himself, the appellant said: "I am a citizen and resident of the State of Illinois, and have been for more than four years last past; I am the same person mentioned as Edward Bessette in the petition for attachment and in the citation issued in this cause on the 13th day of September, A. D. 1901; I am thirty years of age, and for more than seventeen years last past have been a printer engaged in the printing business; I am a member of Chicago Typographical Union, No. 16, of the International Typographical Union, and have been a member of said International Typographical Union for twelve years last past."

Speaking of the objects and purposes of the Chicago Typographical Union, Bessette said they were as set forth in the Constitution and By-Laws of the Union, which he filed as an exhibit with his answer. (Record, pages 452-497.) And he quoted the preamble, as follows:

"Preamble.

"To establish and maintain an equitable scale of wages, and protect ourselves from sudden, unreasonable fluctuations in the rate of compensation for our labor, and protect, too, just and honorable employers from the unfair competition of greedy, cheap-labor huckstering rivals; to defend our rights and advance our interests as workingmen; to create an authority whose seal shall constitute a certificate of character, intelligence and skill; to build up an organization where all worthy members of our craft can participate in the discussion of those practical problems upon the solution of which depend their welfare and prosperity as workers; to foster

fellowship and brotherhood, and shield from aggression the isolated, defenseless toiler; to aid the destitute and unfortunate, and provide for the decent burial of deceased members; to develop and stimulate, by association and social converse, those kindly instincts of humanity that most highly adorn true manhood; to encourage the principle and practice of conciliation and arbitration in the settlement of differences between labor and capital; to incite all honorable efforts for the attainment of better conditions of labor—shorter hours, increased privileges and greater enjoyment of the ennobling amenities of life, the concomitants of culture and civilization; to defend the defenseless, befriend the friendless, and in all charity inculcate lessons of justice and good will among men—the undersigned, journeymen printers of Chicago, do enact, declare and establish the following Constitution and By-Laws for their government."

He represented and showed that it was the policy and purpose of the International Typographical Union to build up and conserve the printing industry, and that to the end that such objects and purposes might be attained, the union had pursued toward employers such a course as that there were now some 42,000 union printers at work in some 7,000 printing establishments in the United States, its insular possessions and the Dominion of Canada. These figures represented approximately seven-eighths of the printing industry. He exhibited contracts made by the union with the American Newspaper Publishers' Association, an organization of the newspaper publishers, embracing practically all the leading newspapers of the United States (Record, pages 98-103), and he also exhibited the contract existing between the Union and the United Typothetae of America, an organization of the book and job printers of the United States. (Record, pages 103, 450-451.) He attempted to prove that the W. B. Conkey Company, represented by W. B. Conkey, was a member of the United Typothetae, but Judge Baker excluded the evidence. (Record, page 562.) He set

forth Conkey's violation of contracts previously made with the Union, and the unlawful arrest and imprisonment of the officers and members of the Union by the Conkey Company on other occasions. (Record, page 104.) He denied that the public officials of Hammond and of Lake County, Indiana, were failing or refusing to do their duty, and he said that, on the contrary, "the only complaint which the W. B. Conkey company can make as against the officials, is, that being advised of the falsity of the charges and of the malicious methods pursued by said W. B. Conkey Company, said officials have decided to, and do refuse to permit the processes of law in their hands to be abused by said W. B. Conkey Company, and diverted from their lawful functions to the selfish and unjust ends of said W. B. Conkey Company." (Record, page 105.) As to his personal behavior in the premises and his experiences with respect to D. R. Huntington, Bessette stated the facts as follows:

"On or about the 27th day of August, 1901, I went to Hammond, Indiana, pursuant of directions given to me by said Chicago Typographical Union, said city of Hammond then and there being within the competitive district of Chicago publishing houses and within the competitive district of said Chicago Typographical Union; that prior to my departure I had been informed that there was a controversy between the W. B. Conkey Company and some of its employes, and I was instructed by said Chicago Typographical Union to investigate the facts in the premises and ascertain the truth pertaining thereto, and to report to the said Chicago Typographical Union upon the causes and conditions of said controversy, and I had no other instructions, powers or duties whatsoever. On my arrival at said city of Hammond I took up my abode at the Monon Hotel, a public hostelry in said city; on the evening of my arrival I was visited by a delegation of printers, who represented to me that they were in the employ of said W. B. Conkey Company and that they desired to quit the service of said Company, and they asked me what said Chicago Typographical Union would do for them, or in their behalf, in the event they quit the service of said Company; I told them I had no authority to give them any as-

surances whatsoever; they informed me that it had been reported among the printers in said city of Hammond that said Chicago Typographical Union had decided not to accept any of them to membership unless they came of their motion before an open meeting of said Union; I answered them that their information was substantially correct, and I now say and represent to this Honorable Court that on, to-wit, the 25th day of August, 1901, a resolution, which resolution was the first action taken by said Chicago Typographical Union in the premises, was adopted by said Chicago Union to the effect that no officer, agent or representative of said Union have authority to give assurances of membership in said Union to any printer at the time employed at Hammond, Indiana, but that said Chicago Union reserved to itself, and withheld from its officers, agents and representatives, the privilege and right to investigate openly the application of any such Hammond printer, with a view of determining his eligibility and competency to become a member of said Union; that thereupon said committee of Hammond printers requested me to use my influence with said Chicago Union to have it accept the applications for membership of said Hammond printers, but to this request I made no promises and gave no assurances whatsoever; that on, to-wit, the 29th day of August, 1901, I reported to said Chicago Union the facts as herein stated of the visit to me by said committee of printers at Hammond and their request with respect to their becoming members in said Chicago Typographical Union; that said Chicago Typographical Union thereupon adopted a resolution to the effect that it would not accept or entertain the application for membership of any printer in the service of the W. B. Conkey Company; that immediately after the adoption of said resolution by said Chicago Typographical Union, on August 29, I notified a committee of Hammond printers of the action of said Union, and that the reason for the adoption of said resolution was that said Chicago Typographical Union would not permit its members to work for said W. B. Conkey Company, because it did not pay fair wages or observe fair conditions in the printing trade, and that by reason of its misconduct in the premises it was unjust to its competitors who were paying fair wages and observing fair conditions that said W. B. Conkey Company should have the co-operation and support of said Chicago Typographical Union; that after said information had been imparted, as I am informed, to said printers at Hammond, I again visited Hammond, and on labor day, to-wit, the 2nd day of

September, 1901, I was called on by one ——— Stone, who said, and represented to me that he came in behalf of one D. R. Huntington and others who had been printers in the service of the said W. B. Conkey Company, but who, having become wearied with the intolerable condition and the unfair wages prevailing in said W. B. Conkey Company, had quit the service of said W. B. Conkey Company, and desired said Chicago Typographical Union to recommend them for employment in the service of publishers who paid fair wages and observed fair conditions, and the said Stone represented to me that said Huntington desired to confer with me to the end that he might obtain a recommendation of said Chicago Typographical Union; that I thereupon investigated the record of the said D. R. Huntington as a craftsman and printer, and ascertained that he had previously been a member of said Chicago Typographical Union, but that he had violated his obligations and had been expelled therefor, and that objections to his membership were likely to be made; that thereupon said Stone informed me of his desire that I make to the said Huntington the statement of his case as it appeared to said Chicago Typographical Union; that thereupon I informed said Stone that I, in company with certain officers of said Chicago Typographical Union, would be at Fitzpatrick's saloon, a public house, in said city of Hammond; that I have no knowledge as to the further action of Stone in the premises, except such as I learned from said Huntington, who, in company with said Stone, came to the place of said Fitzpatrick at the hour I had mentioned; that when said Huntington was introduced to me, he said that he had made the visit to us with some fear that he might be assaulted on the streets; I thereupon asked him who it was that he feared might assault him, well knowing at the time, as I did, that all union workingmen in and about said city of Hammond were strictly observing a policy of peace and conciliation and that they were positively opposed to any act of violence whatsoever; that thereupon the said Huntington told me that he feared that some people upon the street might assault him, and I told him that he was in no danger whatsoever of assault by any union workingmen, and that if he desired assurance in that respect I and the gentlemen who were with me would accompany him to his home or wherever else he might be required to go, and that we would protect him against any violence whatsoever, even though it might involve us in a controversy, we desired him to have perfect assurance that we discountenanced any threats, intimidation or violence toward

any person on account of his connection with said W. B. Conkey Company; that thereupon said Huntington inquired of me as to what the Chicago Typographical Union would pay in addition to granting him a membership card if he would leave the service of the said W. B. Conkey Company; that I thereupon asked the said D. R. Huntington to state to me what, if anything, he thought he was entitled to at the hands of said Chicago Typographical Union; that he thereupon informed me that he had a little printing establishment in his residence in the city of Chicago, upon which there was a mortgage, and that if said Chicago Typographical Union would pay off said mortgage and save his plant for him, or pay him $75 and grant him a membership card in said Chicago Typographical Union, that he would quit the service of said W. B. Conkey, and that in answer to said statement made by said Huntington I told him that it was a matter of indifference to us whether he quit or continued in the service of the W. B. Conkey Company, and I told him that we would not pay him any money; that thereupon said Huntington retired from my presence, in company with the President of the Illinois State Federation of Labor, but he subsequently returned and asked me for a further conference on the following day; I have no knowledge of anything that transpired between said Huntington and said President of the Illinois Federation of Labor. On the following morning I met said Huntington on the streets of Hammond, when he informed me that he had of his own motion quit the service of said W. B. Conkey Company; he told me that he was in financial distress and that his family was destitute, and asked me if I would loan him fifty cents until he would draw his wages from said W. B. Conkey Company; I acceded to his request and loaned him fifty cents, but said sum of fifty cents is the only money I ever paid to said Huntington or ever offered to pay him. On the evening of that same day I again met said Huntington in a street car in said city of Hammond; he was then in the company of his wife and children and his brother; the said Huntington then repaid me the fifty cents and expressed to me his gratitude for the favor of said loan; he introduced me to his wife and children and to his brother; he, of his own motion, stated to me that he was then returning to Chicago and that he was going to change his ways and pursue a course that would command confidence and respect of fellow craftsmen, and that he desired said Chicago Typographical Union to give him a chance and

grant him a recommendation to the employers of union men, to the end that he might obtain fair wages and work under fair conditions; that he and his wife seemed highly pleased with his resolution to return to fair methods, and with the small favor I had granted them in the loan of fifty cents; and I now say and represent to the Court that from the appearance of said Huntington and his family, I believed they were destitute and in great distress at the time I made said loan of fifty cents, and that I would not have accepted the repayment of said loan but for the fact that I feared said Huntington was seeking an opportunity to misrepresent me and to have some apparent reason for saying that I had paid money or held out an inducement to an employe of said W. B. Conkey Company to induce him to leave the service of said W. B. Conkey Company; that either on that day or the day following, and I am not certain which, the said Huntington informed me that his brother was a printing pressman, and that while he had not been in the service of the W. B. Conkey Company, he might enter the service of said Company if he continued to stay in said city of Hammond, and said Huntington told me that his brother desired to go to Kansas, but that he had no means wherewith to travel, and asked me if said Chicago Typographical Union would not give financial assistance, as he was wholly without means; I answered him that the only charity furnished by the Typographical Union was the Childs-Drexel Home for union printers; and I now say and represent to this Honorable Court that said Childs-Drexel Home is in all respects a worthy charity, and that its organization and management are provided for by charter, constitution and by-laws, which are set forth in detail in said Exhibit A, beginning at page 93; that he thereupon asked me if said Chicago Typographical Union had not an arrangement with the railroad companies whereby a cheap rate of transportation could be obtained; I informed said Huntington that during the winter seasons the Chicago Typographical Union had worked in conjunction with the Bureau of Associated Charities in Chicago, and that it had then assisted destitute persons to return to their families and friends in other places, where such destitute persons might be properly cared for and maintained; but I said to him that his brother doubtless would not desire transportation under those terms, even if it were then available, the circumstances of which I was not at the time informed, and I told him that the railroad tickets which had been acquired

and used for the purpose aforesaid, during the preceding winter, bore a large imprint upon their face of the words, "Pauper's Ticket;" the said Huntington thereupon answered that the imprint upon said ticket would make no difference either to him or his brother, and he asked me if I would not loan him $2 for the use of his brother in obtaining said pauper's ticket, which favor I declined to grant him, but did give him the address of the Associated Charities in said city of Chicago; on the 10th day of September, 1901, Huntington approached me in front of the Monon Hotel, in said city of Hammond, and told me he had returned to Hammond to draw a half day's wages which he had earned in the service of said W. B. Conkey Company prior to the preceding pay day; he told me that he had returned to Chicago and had obtained employment, and that he was then an applicant for membership in said Chicago Typographical Union, and that he was doing well, and that he believed his prospects were favorable. I shook hands with him and told him that I was pleased to hear his good reports and that he had resolved to make a man of himself, and wished him success, and he then told me that his brother had gone to Kansas; that he had succeeded in borrowing the two dollars from one Harry Alting, who had previously been in the employ of said W. B. Conkey Company. The foregoing are all the experiences I ever had with said D. R. Huntington, and I have never seen him since we parted at our interview in front of said Monon Hotel on said 10th day of September; that afterwards, to-wit, the 12th day of September, I was informed at the city of Hammond that the said D. R. Huntington had made an affidavit against me, which was to be filed by the said W. B. Conkey Company, in support of its application for attachment in this cause; that thereupon I returned to Chicago and began an investigation of the said D. R. Huntington, and learned that his statements and representations made to me were not true, but, on the contrary, that he was doing some printing work in a dismantled toilet room in his residence in a rear flat over the saloon of Patrick O'Connor, 1789 North California avenue, and that in said printing work he was unlawfully and without right using a legally registered label of the said International Typographical Union, which label had been stolen from the office of the printing establishment of Hyman Quinn & Co., on Dearborn street, near Van Buren, in said city of Chicago, and that with the use and aid of said label he was obtaining contracts for printing on the false and fraudulent representation that he was a member of the Typo-

graphical Union and entitled to the use of said label. I have since been informed, and believe, that the visit of said Stone to the room of said Huntington on the occasion mentioned in the affidavit of said Huntington, was at the instance and request of said Huntington, and by appointment with him, and I deny that any statement was ever made in my presence or with my knowledge and consent to said Huntington, either in the words or to the effect as set forth in his affidavit, to-wit: 'I tell you, Huntington, you must either take your chance of having your head knocked off your shoulders or you must quit that place.' I deny that I ever made to Huntington the statement in the words or to the effect by him charged in said affidavit, to-wit: 'Huntington, the boys have evil designs on you, but if you will come out, we will call the dogs of war off.' And I deny that any such statement or any statement to that effect was ever made by any other person to said Huntington in my presence or with my knowledge and consent." (Record, pages 105-110.)

He showed that the Union was an industrial and benevolent association, and exhibited the Constitution of the Chicago Union (Record, page 96; pages 452-496), and the cemetery statistics and record of charities were proven at the trial. (Record, pages 497-521.) He also exhibited the Constitution and laws of the International Typographical Union (Record, page 96; pages 376-451), and the administration of charities through the Childs-Drexel Home for Union Printers was proven. (Record, pages 522-555.) At the trial Bessette sustained his version of the Huntington matter by the testimony of Michael Colbert (Record, pages 319-581) and of W. J. Spires (Record, pages 562-586); by the affidavit of Timothy O'Brien (Record, page 313) and of John C. Harding (Record, page 315). And the testimony of Huntington, though produced by the appellee, upon cross-examination, largely confirmed Bessette's answer. (Record, pages 206-223.)

In Article 23 of his answer Bessette mentioned the conflict previously existing between Conkey and the Union, and stated how the

Union had opposed Conkey in political work. The answer specifically denied that any act on the part of Bessette was done in contempt of the Court; it prayed judgment that his answer be held sufficient to discharge the rule against him to show cause, and that he be discharged hence with his costs and for all proper relief. The answer was duly verified by Bessette. (Record, pages 110-112.)

COURT'S CONSTRUCTION OF THE RECORD AND PROCEEDINGS, MADE PRELIMINARY TO TRIAL.

Desiring to prepare for his defense and to the end that he might know whether the affidavits filed with the petition for an attachment were evidentiary and in support of the petition for the purpose of obtaining the rule, or whether they were in the nature of separate informations, Bessette, on the 12th day of October, filed his verified motion for a rule to require the complainant:

"1. To file and place upon record in the office of the clerk of this court forthwith a copy of each and every accusation and charge and of each and every specification of an accusation and charge made and intended to be made against this defendant upon the trial of this cause now set for Wednesday, the 16th day of this present month.

"2. To furnish forthwith to this defendant, or to his counsel, a copy of each and every accusation and charge and of each and every specification of an accusation and charge made and intended to be made against this defendant upon the trial of his cause, now set for Wednesday, the 16th of this present month.

"And for cause this defendant would represent and show unto this Honorable Court that he is a citizen and resident of the State of Illinois; that each and every one of the matters and things alleged to be in controversy occurred at and in or in the vicinity of the city of Hammond; that said city of Hammond is approximately almost two hundred miles distant from the place of the holding of this Honorable Court, and that this defendant believes,

and upon such belief states the fact to be, that any and all persons who may be and are advised as to the facts in the premises and of the facts constituting the defense of this defendant are citizens and residents of said city of Hammond, or of other places equally distant and remote; that counsel of this defendant has been informed by counsel for the W. B. Conkey Company, complainant, that affidavits other than the affidavit of one D. R. Huntington, heretofore filed in this cause, have been and are being prepared to be filed at the hearing and trial of said cause; that unless this defendant shall have been at a reasonable time prior to his trial informed of the nature of the accusation and charge against him and furnished with a copy thereof, he cannot safely and properly prepare for his defense. (Record, page 113.)"

The Court denied the right to the rule as prayed, and in a bill of exceptions the Court construed the petition to be for a rule to show cause why Bessette should not be punished for the contemptuous violation of the restraining order, and the Court further held and stated that the petition contained each and every accusation and each and every specification of an accusation upon which the rule to show cause was based. The Court refused to require Conkey's attorneys to present their affidavits. (Record, page 117.)

II.

THE TRIAL RECORD.

SUMMARY OF THE EVIDENCE PRODUCED BY THE W. B. CONKEY COMPANY UPON THE HEARING; IT SHOWS THE TRIAL THEORY TO HAVE BEEN THAT BESSETTE HAD VIOLATED A RESTRAINING ORDER, NOT THAT HE HAD OBSTRUCTED THE ADMINISTRATION OF JUSTICE, AND IT FURTHER SHOWED THAT BESSETTE WAS ABSOLUTELY INNOCENT.

Inasmuch as the law of the case, including the jurisdiction of the Court, largely depends upon whether Bessette was tried for (1) violating a restraining order or (2) for obstructing the administration of justice, a summary of the evidence is necessary.

Upon the issues joined upon the complainant's petition and the answer of Mr. Bessette the Court proceeded to trial on October 16, at Indianapolis. (Record, page 129.) An index of the evidence appears at record pages I-IV, and the stenographer's index is at pages 126-128, in the latter the pagings being to the marginal numbers. The evidence introduced by the complainant was as follows:

ORIGINAL BILL OF COMPLAINT. (Record, pages 129-144.)

TEMPORARY RESTRAINING ORDER. (Record, pages 144-148.)

MARSHAL'S RETURN TO THE RESTRAINING ORDER. (Record, pages 148-149.)

AFFIDAVIT OF HENRY P. BOGLE, averring: Affiant is purchasing agent of the W. B. Conkey Company; on August 16 Harry Alting, a pressman, was discharged for incompetency; three days later thirty-nine pressmen quit the service of the Conkey Company, shutting down the presses; during the week more than one hundred additional employes quit work; men, women and girls joined the strikers; on August 20-24 new men were employed at Chicago to succeed the strikers; Bogle met these new men at trains to escort them to the Conkey plant; on disembarking from trains the new men were immediately surrounded by strikers, numbering variously from fifteen to fifty; strikers made threats and used vile language, so that only 10 per cent. of the new men went to the factory; the injunction was issued August 24 and 500 copies were immediately printed and posted conspicuously throughout Hammond, and on August 25 the principal features of the order appeared in Chicago and Hammond newspapers; on August 25 Bogle "met United States Deputy Marshals Foley and Rankin and assisted them in identifying the parties named in the injunction writ, who

were served by them;" during the week, August 25-31, Bogle *"went to the various railroad stations at Hammond for the purpose of meeting men who had been employed through the Chicago office, and notwithstanding the writ of injunction had been issued, served and liberally published through Hammond, the men whom I met were accosted by the strikers and were persuaded not to enter in the employ of the W. B. Conkey Company;"* ever since the writ was issued strikers and their sympathizers have from time to time assembled on the corner in front of the Conkey plant, and thence paraded up and down Conkey avenue; there has been a well-organized corps of pickets parading streets, highways and paths leading to the plant, and Bessette was among those doing picket work; Bogle has almost daily received reports of injuries to employes inflicted by strikers and their sympathizers; bindery girls have been subjected to insults and threats for not joining the strikers, and some have quit the service therefor; pickets, in groups from four to twenty, constantly taunt employes, who are in fear of their lives and are with difficulty persuaded to remain in the service; policemen have been required to escort employes, but no names or dates are given; Bogle escorted J. B. Horton, E. Minger, Abraham Greenbaum, P. Humphreys and D. G. Sheehan; has heard that the strikers had employed thugs to come from Chicago to Hammond to assault Conkey's employes, and "that these thugs are now in and about said city of Hammond; J. W. Henning, claiming to be a Chicago stonemason, assaulted E. Minger, a Conkey employe, on August 30, and on the day following he also whipped one Horton; Henning was arrested and Harry Morrison, one of the strikers, attempted to get bail for Henning." *Among those who have been most prominent in accosting the men in going to and coming from the Conkey plant and doing picket work and in meeting the men at railroad stations*

and making threats are John Dunlavey, William Rutz, John Ackerman, Gus Collins, E. W. Tatum and Harry Alting. (Record, pages 158-161.)

AFFIDAVIT OF MICHAEL J. KENNEDY, averring: Affiant is a special policeman at the Conkey plant from 6 a. m. to 6:20 p. m.; in the early part of the strike the strikers would surround employes and by means of threats would attempt to induce them to quit Conkey's service; some of the efforts succeeded; affiant escorted employes to the street car to protect them against violence; the injunction was issued August 25 and *"was served on all strikers and all persons at and near said plant;"* in addition copies were printed and posted and circulated; notwithstanding this, a system of picketing has been conducted at the plant, among the pickets being Bessette; pickets formed in squads of three or more; some ride bicycles up and down Conkey avenue, which is used by sixty per cent. of the employes; *"said pickets accost all persons going to and from said plant, and if the same are employed there, attempt to induce persons not to remain in the employ of said W. B. Conkey Company or enter into its employ or have any business dealing or connections with said W. B. Conkey Company;"* has reminded pickets of the restraining order and they disclaimed any intention to obey it; some pickets have used violent and indecent language to persons going to and from the plant. The only specific incident mentioned by this affiant he states as follows:

"On Friday, the 6th of September, 1901, Oscar Holke, H. French and Floyd Foker congregated on the lawn immediately across the street from the W. B. Conkey plant of business, within one hundred feet of said plant, and I approached them and asked them what they were doing. Said Oscar Holke replied, 'I am doing picket work here.' Said Foker and French were present at the time I asked said Holke and heard my question and said

Holke's reply. Said persons after their statement to me remained there for at least two hours, and when they left, three or four persons took their place. I have had similar experiences almost daily with persons who were doing picket work, and said persons do not make any secret of the fact that they are there for picket duty and propose to do so. Among those who have been more active in such picket work are the following: John Dunlavey, John Ackerman and William Rutz, Oscar Holke and E. Wheed, alias Snitzer." (Record, pages 166-167.)

Anton Bruckner testified: He was a printer, residing at Hammond and Chicago, with wife and two children; in the service of Conkey Company three years continuously except one week during the strike; resided on Conkey avenue, in Hammond; strikers in passing his house called out, "Here lives Toney Bruckner. He is a rat;" this so worried Mrs. Bruckner that the family moved to Chicago; notices of the injunction were posted on Sunday, and on the following Friday witness first met Bessette; they were in a group, and one man inquired of witness if he was still working; witness answered, "No," and said he was going to move back to Chicago; the man then said, "All the boys that are out will be taken care of, they will all get a card;" Bessette merely handed his card to witness on being introduced by a Mr. Murtis; Bessette said nothing as to what connection he expected to have with the strike; witness attended a meeting at which Bessette was present, the total attendance being eight or ten; Bessette said it would be advisable to place men as pickets at the plant and around there and at the depot.

41. Q. Did Mr. Bessette say anything as to what were to be the duties of the pickets? A. Well, it was to get the men out if they could, and the proposition was made, how could we get the men out. I don't remember who said it, but it was said, "How can we ap-

proach the men in order not to get into trouble on account of this injunction?" and they simply said to ask them if they wanted a card.

42. Q. Did Mr. Bessette respond to the inquiry as to how they were going to get around the injunction? A. Yes, sir; he gave the answer.

43. Q. That was Mr. Bessette's answer, and he said to ask them if they wanted a card? A. To ask them if they wanted a card.

44. Q. What else did they say he should do? A. Well, I don't remember.

45. Q. What, if anything, was said about stopping the men who wanted to go into the factory in order to get work? A. I don't remember of anything said in regards to the men.

46. Q. Was anything said at that meeting, that you now recall, with reference to how the strike should be conducted? A. No, sir.

47. Q. Or by any person there in response to the question or inquiry, or whether there was anything said by Mr. Bessette about the conducting of the strike? A. Only in regard to the card matter; that is all I remember. (Record, pages 170-171.)

Witness described how Bessette and others went to a Monon train to see if any men got off, Bessette saying, "Don't let any of them escape; if any of them get away we will get them;" witness saw Bessette around the Monon depot several times watching trains, but never saw any men get off the cars who were going to Conkey's; saw Bessette with Murtis, Weeks, Schleicher and Dunlavey, but did not remember to have seen him with Alting; heard Bessette tell about his giving his card to Armstrong, foreman of Conkey's composing room; "It's a good joke," Bessette said, "I met Mr. Arm-

strong and asked him if I could get a job. 'Well,' he says, 'are you a printer?' and I says, 'Yes.' 'You come on in and I will give you a job,'" so with that he pulled out his card and handed it to Mr. Armstrong; "'Oh,' he says, 'of course, you do not want a job,'" and he says, "I think I will go up there to his house to-night and see if I cannot get him out;" witness did not know whether Bessette went.

The following questions and answers fairly outline the cross-examination of this witness:

82. X.-Q. You understood, did you not, at the time Mr. Bessette made that remark that it was merely told as a joke A. Well, I didn't know at the time whether he was joking or not.

83. X.-Q. It was told in a spirit of levity and humor, wasn't it? Told as a joke? A. Well, I couldn't say it was a joke; I thought, though, if he could have got him out he would have done it.

84. X.-Q. Well, he didn't tell you at that time about intending to do anything improper towards Mr. Armstrong or anybody else, did he? A. Well, nothing improper; only trying to get Armstrong out, that is all.

85. X.-Q. That is, if he could persuade Mr. Armstrong to quit his work there he would do it? A. Yes.

86. X.-Q. That was the impression you got from the conversation? A. Yes, sir. (Record, page 173.)

Witness described the places where he saw Bessette and the conduct of Bessette as follows:

98. X.-Q. How far were these places from the Conkey plant? A. About a mile or a mile and a half; I couldn't judge exactly.

99. X.-Q. Well, they were up town, near the railroad station at that time. A. Yes, sir.

100. X.-Q. Not in any manner interfering with the Conkey people, were they? A. Not that I have seen.

114. X.-Q. You never heard Mr. Bessette call anybody vile names? No, sir.

115. X.-Q. Did you ever see Mr. Bessette doing anything there that wasn't gentlemanly and entirely proper? A. I never saw him doing anything out of the way; that is, in regard to not being a gentleman.

116. X.-Q. Did you ever see him commit any act of violence or commit any sort of depredation against Mr. Conkey? A. I never was with him enough to see him.

117. X.-Q. There wasn't any reason why he should suspect you or act differently in your presence or act different than when others were around? A. No, sir. (Record, pages 174-175.)

Charles Meyers testified: Witness was an electrotyper, resided at Detroit; employed in Conkey's service during the strike; previously worked there eight months and two years before; met Bessette at State and Homan streets; each explained his identity to the other; Bessette said he could not shake hands with witness—not touch him with tongs—while he worked at Conkey's; that a man who worked there was a scab and a rat.

On cross-examination Meyers could not give the name or address of his friend with whom he was talking when he met Bessette; witness, when asked if he had not been discharged because he was a metal thief, answered, "No, sir, and you can't find that in the court books in Hammond."

On redirect examination witness testified that Bessette said that men who worked during the strike could not possibly get work elsewhere. (Record, pages 176-181.)

GUS WANGEMAN testified: He was a press-feeder in Conkey's service since last May; was a striker nine weeks; went out with the pressmen; the notice of the injunction was discussed on the Sunday it was issued; saw Bessette and Alting up town four or five times; they were standing, talking about some outcome of a meeting of Chicago Typographical Union with reference to its admission of Conkey strikers; that was all witness ever heard Bessette say; he and Alting and others, but not Bessette, talked of picketing and of importing a wrecking crew to fix the people down there; saw men picketing around the plant.

36. Q. Did you ever hear Mr. Bessette say anything about interviewing men on the subject of continuing their work or discontinuing it? A. No, I did not.

37. Q. Never heard him say anything on that subject? A. No, sir; I didn't.

Witness testified, on cross-examination, that he saw Bessette in Hammond only five times and all between the last week in August and September 10; never saw Bessette except at State and Homan streets, and never saw him within a mile and a quarter of Conkey's plant; there were many streets between where Bessette was and Conkey's place; heard Bessette talk of the probable action of Chicago Typographical Union as to taking in Conkey strikers; never saw Bessette at the Conkey plant.

75. Q. Did you ever see Mr. Bessette do any picketing 'round there? A. No; I did not.

76. Q. Did you ever see Mr. Bessette or hear of Mr. Bessette using any vile language or epithet toward any person? A. I never did.

77. Q. Have you told us all you ever heard Mr. Bessette say and all you ever saw him do about there? A. I have.

Witness testified that he was one of the pickets on duty at the Conkey plant; he had heard vile and profane language used by the pickets, but did not know that others heard it; said pickets got in front of men going to the works, but the men proceeded.

114. X.-Q. There were no threats made against them? A. No, sir.

115. X.-Q. The boys simply tried to persuade them to go out? A. Yes, sir.

116. X.-Q. No violence used in any way against them? A. I didn't hear any.

* * *

179. R. Q. Well, did you learn from any of the strikers or from any of the pickets, or from Mr. Bessette or from Mr. Alting, as to the commission of assaults on persons by the wrecking crew or others? A. No; I did not.

Witness testified, on recross-examination, that he never but once heard from any person of any assault being committed on any person. The instance was related to him only in a general way by Ed Rice, a striker, who said that a man was beaten on Calumet avenue one night. (Record, pages 181-194.)

Vena R. Hunt testified: He was a clerk in the Chicago office of the Conkey Company; acted as escort for new men employed by the company at Chicago to take the place of strikers in the plant at Hammond; generally went out from Chicago on the Monon railroad at 8:30 a. m.; on arriving at Hammond, until within "two or three weeks of the present day," there would always be some of the striking pressmen at the railroad station, who would come up and talk to these men, telling them "that there was a strike on and that they ought not to be going out there; that these fellows who

were on a strike had Conkey in just the place they wanted him and if people would only stay away they would win their point and be all back there again in a short while;" if the escorted men did not seem to weaken the strikers would say they were going to win peaceably if they could, forcibly if they must; at first there were eight to a dozen strikers at the railroad station, but subsequently only a couple of them; generally Bessette would motion to the strikers where to go, and they went; they were quiet after the injunction was issued; they told me they would take care of me some time, but I never met with any obstruction after the injunction was issued; these experiences were all a mile and a half from Conkey's plant; several times there were pickets at the plant; two watchmen were maintained there; saw Alting at the depot; Alting was "going to smash" witness before the injunction was issued; heard strikers say "a fellow was beaten up pretty badly the other day;" this was told to the new men; it was also told them that the groceries would not sell to boarding houses which entertained the new men.

41. Q. What did they say, if anything, Mr. Hunt, about if these men would go to work whether they would be called scabs and other vile names by the strikers, or did they say anything of that kind to these men for the purpose of influencing them not to go to work there?

Mr. Rooker: Objected to as leading and suggestive.

The Court: Put it in a less leading shape.

42. Q. What, if anything, was said, Mr. Hunt, to these men that if they did go to work that they would be called names by other people; if they said anything of the kind, what did they say they would be called on account of working at the Conkey plant? A. I didn't hear anything in regard to that at all." (Record, pages 198-199.)

On cross-examination the witness testified that he never heard anybody call any of the people witness had in escort scabs or rats, and he did not think there was ever any violence committed; since the restraining order was issued witness had taken down to the plant from eighty-five to one hundred men, of whom the strikers had induced from twelve to fifteen to join them.

60. X.-Q. Do you know, Mr. Hunt, whether or not the men that you lost there were actually seeking work or were somebody that wanted to travel down with you and find out what the Conkey people were doing? A. Well, to the best of our knowledge they were men who wanted to go to work. We always questioned them carefully and didn't take them unless we felt satisfied they wanted to go to work.

61. X.-Q. Did you tell them the same things that they always learned from the strikers? A. Yes, sir; we told them the situation down there. We didn't take anybody that wasn't perfectly willing to go.

62. X.-Q. You took nobody but what he said he was willing to go? A. No, sir.

63. X.-Q. When these men actually quit, what did they say to you, or what did you say to them about their not continuing on down to the plant A. Well, if they went off with other fellows I didn't chase after them. I always asked them if they wouldn't come along. If they didn't choose to do so I let them go.

64. X.-Q. They would smile at you and tell you no, wouldn't they? A. That was the size of it; yes, sir.

65. X.-Q. Now, you say you saw Mr. Bessette 'round there. Did you ever have a conversation with Mr. Bessette? A. No, sir; I never did.

66 X.-Q. Did you ever ask Mr. Bessette not to interfere with you or the men with you? A. No, sir; I did not.

67. X.-Q. Why didn't you tell them you would like to go unmolested? A. I didn't have anything to do with him. I attended to my business as best I could.

68. X.-Q. You never made any complaint to Mr. Bessette that his action was offensive to you? A. No, sir.

69. X.-Q. You never heard anybody else complain to him? A. I never heard anybody complain to him.

70. X.-Q. Did you ever see him do anything there that was rude or violent in any way? A. No; I didn't.

71. X.-Q. Or ever hear him use any improper language? A. No, sir; he was always 'round at the depot, or nearly always, and always seemed to be giving directions to the pickets around there.

72. X.-Q. What directions did you hear him giving? A. I didn't hear him give any directions. I seen him motion a number of times when we started down the platform, and the other men that was there they would all follow us.

73. X.-Q. How soon did you see him make the first motion of that kind A. How soon after the strike began; after the injunction was issued? I think it was right after the injunction was issued.

74 X.-Q. He wasn't there, then, before the restraining order was issued; was he? A. I don't remember seeing him, but I may be mistaken.

75. X.-Q. At least, he didn't attract your attention prior to that time? A. I didn't see him prior to that time. (Record, pages 200-201.)

Witness further testified that there were strikers at Speling and Homan streets, as well as at the railroad station; that at these points the city was densely built up; that many men had quit work, and he knew of no engagements that would take them elsewhere;

the Conkey plant was a mile and a quarter distant; witness never met any strikers or pickets except up in the thickly populated part of the city, and never saw any demonstration of violence toward any of the men he had with him at any time. Witness never knew of anybody getting hurt, except Horton.

91. X.-Q. Do you know who the fellow was that you spoke of that was hurt? A. His name is Horton.

92. X.-Q. Do you know what he had his fight about? A. No, I do not.

93. X.-Q. Do you know whether or not he had his fight over his connection with the Conkey Company? A. Well, he told me that the wrecking crew they sent out from Chicago got after him that night; that is all I know of it.

94. X.-Q. Did you ever hear of the wrecking crew there hurting anybody except Horton? A. Yes; one other man told me about it.

95. X.-Q. What was the name of that man A. A man that was a witness here.

96. X.-Q. Did he get hurt? A. No, I don't think he did.

97. X.-Q. Horton was the only man that got hurt? A. As far as I know.

98. X.-Q. Do you know whether he got hurt or whether that was simply a ruse made up by Horton to gain the favor of the Conkey Company? A. Well, he told me that. I don't know why he should tell me that if it wasn't so.

99. X.-Q. He told you because he knew you were in the office of the Conkey Company? A. He was in the office of the Conkey Company when he told me.

100. X.-Q. How far was the office from his place of employment? A. He wasn't working anywhere.

101. X.-Q. How far was your office from the place where he was employed to work? A. Our office?

102. X.-Q. Yes. A. Our Chicago office is about twenty-two miles. He was up there on some business. He was waiting to see somebody at the Chicago office and I talked with him a few minutes.

103. X.-Q. He wanted to see somebody up there and tell them about the wrecking crew, didn't he A. I don't know, I am sure.

D. R. Huntington testified as to his meeting O'Brien, Colbert, Harding, Bessette and Spires (whom witness calls Sievers or Stevers) in Fitzpatrick's saloon; was escorted to the place by a boy named Stone, who came to Huntington's room in their boarding house without invitation; witness was afraid not to go with Stone; he narrated the events of the meeting which he had previously described in his affidavit filed with the petition for attachment (Record, pages 66-68); Bessette used the telephone to learn who was coming down from Chicago.

On cross-examination witness accounted for the discrepancies between his affidavit and his testimony on the ground that when he made the affidavit he did not tell the whole truth, because he desired to shield Chicago Typographical Union; the affidavit made by witness was introduced in impeachment (Record, page 210); the boarding house in which Huntington was living was also the boarding house of the boy Stone. Witness described the boarding house as a kind of headquarters for the strikers. It seems that Huntington was a sort of detective who was lodged in that boarding house. He swore: "I stayed in that headquarters and seen telephone messages to watch for such and such men coming up there to town." (Record, pages 212, Q. 94.) It also seems that Huntington was a professional "strike-breaker" rather than one of

those "industriously pursuing his God-given right to labor," whom the trial court so often mentioned. He testified:

199. X.-Q. Now, Mr. Huntington, you have a great deal of feeling against the Typographical Union and against Mr. Bessette, have you not? A. I have considerable feeling against the Typographical Union.

200. X.-Q. How long have you entertained that bitterness of feeling A. For a great many years.

201. X.-Q. To what extent has that bitterness of feeling influenced your conduct? A. Well, I have gone out in times of a strike and taken men into work, and I stand ready and willing to do it again.

202. X.-Q. How long have you been pursuing that course, Mr. Huntington? A. I couldn't tell you the number of years.

203. X.-Q. How many years have you gotten men to take the place of people who quit work? A. Good many times.

204. X.-Q. And you were doing that always because of your hostility to the Typographical Union? A. Yes.

205. X.-Q. Do you have that same feeling against Mr. Bessette that you have toward the Typographical Union? A. No, I have no feeling against Mr. Bessette particularly until he molests me, and the man that molests me or my family he must look out, for I am going after him.

206. X.-Q. And to what extent does that bitterness influence your testimony in this case? A. Not one particle.

207. X.-Q. To what extent did that influence your deposition that you made before Mr. Bogle on the 10th of September? A. I stated there the truth.

208. X.-Q. The question is, did it influence you, your feeling of hostility toward the Typographical Union or Mr. Bessette, did

it influence you as to what you stated in your affidavit? A. No, sir, it didn't influence me a particle at the time I made the affidavit.

209. X.-Q. Did you ever have any experience with this wrecking crew yourself?

The Court: You need not answer that unless it is confined to this wrecking crew at Hammond.

210. X.-Q. That is what I meant, at Conkey's? A. No, sir.

211. X.-Q. Did you ever see the wrecking crews or members of it? A. No, sir. (Record, page 221)

Witness testified that when he quit at Conkey's he went to Chicago Typographical Union and got a working card, but that he did not apply for work. Witness combined his detective functions with his strike-breaking record as follows:

155. X.-Q. You did know at the time you had these conversations that the Chicago Typographical Union had adopted a resolution withholding from its officers the right to give assurances to any man in Conkey's that he could get into the Chicago Typographical Union No. 16? A. Well, I had such knowledge; yes, sir.

156. X.-Q. How long had you had that knowledge prior to the time you met Bessette and Colbert in Fitzpatrick's saloon? A. Well, that meeting was on the last Saturday in the month, and I got the report from that meeting about an hour after it adjourned.

157. X.-Q. That is, the last Sunday in August you learned about that fact, and you met these gentlemen about the 2nd of September. Now, will you tell the Court what interest, if any, you had at that time in knowing what action the Chicago Typographical Union would take with respect to the Conkey men? A. Well, the interest I had in it, I would like to keep posted on what was going on.

The Court: That was a sort of academic interest.

The Witness: I wanted to know what was going on in the printing trade, and I think I kept myself pretty well posted.

158. X.-Q. After you went to the Typographical Union in Chicago and got your card or permit, did you make application to work in Chicago in union offices? A. Why, certainly not.

159. X.-Q. Made no effort whatever to use it? A. Why, no.

160. X.-Q. How long did you continue without any effort to get work? A. How long did I continue?

161. X.-Q. Yes? A. I didn't try to get any work in Chicago at all. I didn't want to work there. I wanted to work in Hammond.

162. X.-Q. How long did you keep away from Conkey's? A. Well, I went home Wednesday, I think it was, and I wasn't able to get out of my bed until Monday. And I come down to their office in Chicago and told them I wanted to go to work, and I came out to Hammond the next day and have been there ever since.

163. X.-Q. Have you got the card now that you got when you went in to their headquarters? A. Which, the permit?

164. X.-Q. Yes. A. No, I threw it away; gave it to my children to play with.

165. X.-Q. You say you got that card the day before you went to Conkey's? A. I got it the day I went into Chicago from Hammond. I went to headquarters and got it. (Record, pages 217-218.)

Witness testified as to a search warrant being served upon him and his house searched for a registered label or trade-mark of the Chicago Typographical Union which had been stolen from a Chicago publishing house; witness was using the label upon work he did in a little plant at his home. (Record, pages 207-208.)

Louis Florence testified: He was a striker and did picket duty under John Dunlavey; Harry Alting was in charge and told witness he (Alting) "was going to put a wrecking crew out and wanted me to join it;" witness had seen Bessette on the streets at Hammond, but never was introduced; saw Bessette with Alting two or three times; about the middle of August he was one of a party of boys who said they were going to meet a pressman named Keiser and beat him up; the members of that party were all from the Conkey works, and none was from Chicago; Bessette was not there; never heard Bessette countenance any violence or vile language, or anything of that sort, but he was always conducting himself as a gentleman; witness knew nothing of any picketing after the restraining order. (Record, pages 223-229.)

Robert Armstrong's affidavit: Affiant was a foreman at Conkey's; saw Ed Bessette step out of a band of pickets and go to a street car in which affiant was about to go down town; Bessette asked for work and was told to come to the plant next morning; Bessette then handed his card to Armstrong, showing Bessette's connection with the union; "I then said that I didn't think he wanted to work here," to which Bessette replied, "I should say not;" subsequently Bessette called at affiant's residence; "He told me he wanted to take my application to the Chicago Typographical Union. I refused to allow him to present my name, and we then together discussed the Chicago Typographical Union. He told me that any time I cared to join the union I could have a card." (Record, pages 230-239.)

Thomas S. Bailey's affidavit: Had seen pickets and evaded them. Recognized among them Gross, Dunlavey and Rutz. (Record, pages 239-241.)

JAKE ENGEL's affidavit: Affiant was a former employe of Conkey and returned to the service after the strike; met Harry Alting, who threatened to get some fellows to whip affiant; on September 10 affiant and Maximillian Keiser were assaulted by John Dunlavey, Harry Alting, Jack Sugrue, ——— Hoek, William Rutz, ——— Eldridge, ——— Gross and Wright and others, whom affiant could identify if he could see their faces. (Record, pages 241-247.)

MAXIMILLIAN KEISER's affidavit: Was present with Jake Engel and shared in the assult of September 10 committed by John Sugrue, John Dunlavey, Harry Alting and Harry Morrison. (Record, pages 248-254.)

JAMES FRANCIS WATERS' affidavit: While enroute to work at Conkey's August 31, met five striking employes, who applied to affiant vile epithets. (Record, pages 254-255.)

C. F. WILKINSON's affidavit: Was called vile names by strikers on August 31. (Record, pages 255-256.)

GEORGE LLOYD's affidavit: "I attended several meetings of the other striking employes of the Conkey company. At these meetings Harry Alting presided and was the moving spirit. He frequently addressed the meetings. All of the meetings which I attended were held after the injunction in this case was issued. At them names were read by the president, Harry Alting, of different persons who were appointed on picket duty. There were two leaders of the bands of pickets. One stationed at the Conkey Company's plant and the other one down town, who had charge of the picketing at these two places. The leader of the pickets in and about the Conkey Company's plant was John Dunlavey, and William Rutz was the leader of the pickets down town." (Record, pages 256-258.)

HARRY OAKLAND's affidavit: Affiant had been accosted and insulted by pickets and by John Dunlavey on September 7, who used vile language. (Record, pages 258-259.)

FRED FORSHALL's affidavit: Have already made two affidavits; was accosted by strikers and insulted. (Record, pages 260-261.)

MR. MILTON HILL's affidavit: Was with Harry Duel, when strikers applied to them vile epithets. (Record, pages 262-263.)

HARRY DUEL's affidavit: Confirms the affidavit of Milton Hill. (Record, pages 263-264.)

CHARLES MINGER's affidavit: Describes an assault committed on him August 30 by a man named Henning. (Record, pages 264-265.)

DANIEL J. SHEEHAN's affidavit: Describes the assault on Charles Minger. (Record, pages 265-266.)

ABRAHAM GREENBAUM's affidavit: Describes the assault on Charles Minger. (Record, pages 267-268.)

DANA SUMMERS' affidavit: Described the arrest of Henning for assault on Minger and the interest taken by Gus Collins, a striker, in that arrest. (Record, pages 268-269.)

JOHN B. HORTON's two affidavits: Pressfeeder, employed at Chicago to work for Conkey, and was told of the strike at the time of employment; had a fight with strikers and told his troubles to policeman No. 2, who refused to arrest the assailant without a warrant. "For fear that my life was in danger I finally consented to leave Hammond, Indiana, and left there on Friday, September 13, 1901, the circumstances surrounding my leaving Hammond being as follows: * * * And further deponent saith not." (Record, pages 270-273.)

Maggie Essler's affidavit: Both before and after the injunction saw many strikers doing picket duty, but the only ones she recognized were John Dunlavey and
these bands of men frequently threatened her, and Dunlavey came to her house, where he used indecent language. (Record, pages 273-274.)

Lena Rupple's affidavit: Was called vile names and threatened by John Ackerman and John Dunlavey. (Record, pages 275-276.)

Anna Rupple's affidavit: Similar to that of Lena Rupple. (Record, pages 276-277.)

Mollie Rutz's affidavit: Similar to that of Lena Rupple. (Record, pages 277-278.)

Anna Gehrke's affidavit: Similar to that of Lena Rupple.

Alfred E. Wilcox's affidavit: He was general manager of W. B. Conkey Company; losses of the company caused by the violation of the restraining order will exceed $100 daily from August 24 to October 22. (Record, pages 281-282.)

The Defendant's Evidence: "We are trying the question whether or not, being there, he (Bessette) did anything that was unlawful or a violation of the injunction. That's all."—Judge Baker in striking out part of Bessette's answer. (Record, pages 310-311.)

For as much as the theory of the prosecution does not depend upon the evidence of the defendant, that evidence will be very briefly summarized. The verified answer of Bessette was admitted. (Record, pages 283-311.) Subsequently so much of the answer as pertained to D. R. Huntington's unlawful use of the label was

struck out. (Record, pages 307-311.) The answer included the arbitration agreement between the American Newspaper Publishers' Association and the International Typographical Union. (Record, pages 291-296.) Also, the agreement between the same Union and the United Typothetae of America. (Record, pages 306-307.) This answer has previously been summarized. (Ante, pages 27-39.)

The order of the Court, upon which the writ of citation issued against Bessette, was predicated. It requires him to answer for the violation of an injunction. (Record, page 311.)

The order served upon Bessette, showing he was to answer for the violation of a restraining order. (Record, pages 312-313.)

The affidavit of Timothy J. O'Brien. It sustains the answer of Bessette as to the meeting with Huntington in Fitzpatrick's saloon. (Record, pages 313-315.)

The affidavit of John C. Harding sustaining the answer of Bessette as to the Huntington charges. (Record, pages 315-317.)

The affidavit of E. W. Tatum, denying participation in any act of violence; any participation with Bessette in any act of violence or unlawful act, and denying any knowledge of or acquaintance with Henning prior to the assault on Horton.

Michael Colbert's testimony: He was president of Chicago Typographical Union and a printer thirty-one years; been in the service of the Chicago Tribune twenty-one years; knew Edward Bessette, a printer, employed on the Chicago Inter Ocean; there are 2,200 members of Chicago Typographical Union; the hours of labor in the craft are such that the only concurrent hour for refreshment available to all the branches of the craft is 2 p. m. on Sunday, at which hour all unions meet monthly; at the time under inquiry did not know Harry Alting, William Rutz, Gus Collins,

Theodore Hoberg, John Ackerman, John Henning or Harry Morrison; had since met Dunlavey, Ackerman and Morrison; visited Hammond in company with Bessette and Harding; first visit was August 27 and again on August 30, and on Indiana's Labor Day, September 2; was told by a printer in Hammond that a man named Huntington wanted a conference at Fitzpatrick's saloon; witness made inquiry as to where that place was and at the appointed hour he went there; Bessette, Spires and O'Brien were there; some one remarked that "Huntington wanted to see me and he would be down there in a little while;" party went into a back room and sat down to wait; Huntington and Stone came together; describes the interviews with Huntington, similar to the statement in Bessette's answer; defined for the Court the craft's use of the terms union, non-union and rat, the rules of apprenticeship, the contracts with publishers and how emergencies in the service are met by the unions when large numbers of extra men are required, as instanced by the assassination of President McKinley.

At this point in the trial the examination was participated in by Judge Baker, who expressed his views as to labor unions. (Record, pages 321-331.)

Witness further testified that it was against both the policy and the law of the union, punishable by expulsion, for any officer or member to commit or advise any act of violence, either in case of strike or otherwise; the Franklin Union, at Chicago, is an association of pressfeeders, an independent organization and without the slightest affiliation with the Typographical Union; denied participation, either directly or indirectly, in any act charged by the plaintiff; stated the instructions to Bessette, the action of the union with respect to Conkey's men, reviewed the controversy between Conkey and the union, described the union labels and stated the objects of his union's sending a representative to Hammond.

On cross-examination witness testified that Conkey moved his plant from Chicago to Hammond with the declaration that he was going to run non-union; Conkey had run a union office without having any trouble; witness had been absent from Chicago, and on returning learned that Conkey's pressmen had organized a union and that there was trouble; there was a possibility of the Pressmen's Union getting recognition at Conkey's and putting in the registered label of the Typographical Union.

By the Court: 277 X.-Q. Let me ask you right there! Is it your idea that there is any earthly possibility of a strike succeeding without being accompanied by intimidation or violence, any earthly possibility of its succeeding? A. There have been a number of them in the Typographical Union.

278 X.-Q. Well, I never have heard of any; and I don't see how it could happen. If men are left perfectly free and unmolested to act and fill the places of those who have quit, I don't see how a strike can succeed. *I have always had an impression that in order for a strike to succeed it was necessary to kill somebody or terrorize somebody?* A. That is not the record in our organization, Your Honor, taking it all over the country. The printer, as a rule, is not a fighting man; his business and his associations would never make him that kind. He must have a certain amount of education in order to be a printer, and he must have a certain amount of intelligence in order to be educated, and men that are capable of being reasoned with are usually reached in that way. A printer is a reasonable man to deal with, as you will find; if you attempt to use force with him he is as independent as any man can be. (*Domenico vs. Alaska Packers' Assn.*, 112 Fed. Rep. 554.)

The witness reviewed at length conversations with Huntington, and the acts, objects and purposes of the Typographical Union. (Record, pages 319-557.)

The Constitution and Laws of the International Typographical Union. (Record, pages 376-452.)

The Charter, Deed and Regulations of the Childs-Drexel Home for Union Printers. (Record, pages 428-450.)

The United Typothetae Agreement. (Record, pages 450-451.)

Chicago Typographical Union Constitution and By-Laws. (Record, pages 452-497.)

Cemetery Statistics Chicago Typographical Union. (Record, pages 497-521.)

Union Printers' Home Prospectus and Reports. (Record, pages 522-556.)

George W. Day testified: Was president of Chicago Typographical Union in 1897-1898, and acquainted with W. B. Conkey; identified the contract with the union under which the Conkey plant was operated in Chicago; when Conkey moved to Hammond he discharged his union men; witness went there to see Conkey with a view of adjusting any troubles, but the Court refused to permit him to relate how he was assaulted by Conkey and others, and required to flee for safety. (Record, pages 557-560.)

George Thompson testified: Was a printer, a member of the Chicago Union, and knew W. B. Conkey; went to Hammond in August, 1898, to see Conkey. The Court refused to permit him to relate how Conkey had witness arrested and held in prison without trial. (Record, page 561.)

C. E. Hawkes testified: Was first vice-president of the International Typographical Union and helped make the contract with the United Typothetæ, *supra*. (Record, pages 306-307.) The Court refused to accept the testimony as to Conkey's membership in the United Typothetæ at the time. (Record, pages 561-562.)

William J. Spires testified: As a representative of Chicago Typographical Union, was at Hammond with Mr. Bessette; related the Huntington incident as described, *supra*, by O'Brien, Harding, Colbert and the answer of Bessette; described the conduct of Bessette as always proper and worthy of respect. (Record, pages 562-571.)

Bertha Molenski testified: Was a bindery girl in the service of Conkey at Hammond; weekly wages in the bindery were from $2.50 to $4.50; a union was organized and the girls discharged. The Court refused to hear testimony that wages for the same services in Chicago were $8.00 to $9.00 per week; also that both Conkey and the forewoman of his bindery swore at the girls and used vile language in their presence; also that the organization of the union was for the purpose of obtaining fair wages and fair conditions of service. (Record, pages 571-574.)

Ida Adams' affidavit: This was rejected by the Court. It related to the experiences of the bindery girls at Conkey's. (Record, pages 575-576.)

Claudie McAnally's affidavit: Similar to that of Ida Adams, and same ruling thereon by the Court. (Record, pages 576-577.)

John Dunlavey's affidavit: That for a long time prior to the filing of the original bill in this suit affiant had been a citizen and resident of Illinois; that several months before the bringing of this

suit affiant had explained to the foreman of the W. B. Conkey Company why affiant was residing in Illinois; that affiant is acquainted with the following named defendants, who at the time of the filing of the original bill were likewise citizens and residents of Illinois, viz.: Edward Wheed, alias Snitzer; Oscar Kohlstadt and Wheeler Armstrong; that, upon the belief of affiant, the complainant's averment that affiant was a citizen and resident of Illinois was made for the fraudulent purpose of having the Court assume a jurisdiction to which it was not lawfully entitled. (Record, pages 577-579.)

Vera R. Hunt, recalled: Identified a letter written October 4, 1901, by the W. B. Conkey Company to William Volkman, who is charged in the petition along with Bessette with violating the restraining order. The letter says, "We do not know why you left our employ, etc.," and asks him to return to the service at "a very much larger salary than we could pay to one not experienced." (Record, pages 580-581.)

Michael Colbert, recalled, testified: The Conkey men who made application for membership in the Chicago Typographical Union were admitted. (Record, page 581.)

Bertha Molenski, recalled, testified: The bindery girls quit work August 20; at that time did not know Bessette or any other member of Chicago Typographical Union; first met Bessette at the New England supper given between September 2 and September 11. (Record, pages 581-582.)

Clara Portz testified: Was a bindery girl at Conkey's; quit there and some two weeks later first met Bessette. (Record, pages 582-584.)

James M. Lynch testified: President of the International Typographical Union; its membership is approximately 40,000 and it furnishes the labor in some 8,000 to 10,000 printing establishments. The Court refused to hear testimony as to a controversy between the Printers' Union on one hand, with the Pressmen's and Bookbinders' Unions on the other hand, over the union label; and refused to hear testimony as to the objects of the Typographical Union. (Record, pages 584-585.)

William J. Spires, recalled, testified: Described the street car meeting between Mr. Bessette and Robert Armstrong, and said both those gentlemen at the time treated the card incident as a ludicrous situation and a joke, and laughed heartily over it; denied that there had been conferences with Alting, etc. (Record, pages 586-587.)

Henry C. Pettit, United States Marshal, testified: He served the writ of citation on Mr. Bessette; described the men as being orderly; they assisted the officer by pointing out the men named in the writ. (Record, pages 588-591.)

B. Frank Schmid testified: State Labor Commissioner; visited Hammond in the performance of his official duties concerning the Conkey strike; conferred with W. B. Conkey; during the three or four days witness was at Hammond he saw nothing out of order at all in any way, shape or form; everything was quiet and peaceable; everybody was behaving himself; everybody were behaving themselves; was with Mr. Conkey, but heard no complaint from him or any member of the company as to the conduct of Mr. Bessette. (Record, pages 591-593.)

L. P. McCormack testified: State Labor Commissioner; visited Hammond with Dr. B. Frank Schmid, associate commissioner; was introduced to Mr. Bessette by Dr. Schmid, and we

dined together; conferred with Bessette about the situation; saw him on the street several times, but never within a mile and a half or two miles of the Conkey plant; his deportment was the same as that of any other good citizen, and his conversation was the same; was told that there had been some lawlessness there prior to September 4, but witness saw none of it, nor did he see anything unusual; did not hear that strikers were intercepting trains. (Record, pages 593-597.)

III.

ERRORS RELIED UPON.

In the event this Court shall consent to consider the whole record it will be found that the questions of law presented are in their character two-fold, viz.:

(1) Those which are stated by the Court of Appeals in its certificate and pertain to appellate jurisdiction; and

(2) Those which arise on the record of the trial Court and address themselves to the merits of this appeal.

Under this general classification the points which may be considered are subdivided as follows, viz.:

THE QUESTIONS CERTIFIED.

For convenience the questions certified by the Court of Appeals are repeated:

> **First: Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of a Circuit Court of the United States, finding a person guilty of contempt for violation of an order of that Court and imposing a fine for the contempt.**

Second: Whether the "act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3d, 1891 (26 Stat. 826), authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that Court made in such suit, and imposing a fine for such contempt.

Third: Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

Fourth: Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error.

THE RECORD OF THE TRIAL COURT.

While the appellant has no right to assume that this Court will consider the whole record, he nevertheless deems it his duty to state the errors relied upon in the Court of Appeals because some of them elucidate those certified questions which pertain to the method of review, i. e., whether by appeal or writ of error. It may lighten the labors of this Court to know whether in this case the review should be by the one method or the other; for if, in this case, an appeal is the proper practice, it would not be necessary to determine whether a writ of error would lie in some other case of different qualities. The assignments of error in the Circuit Court of Appeals (Record, pages 119-122) challenged twenty-five rulings of the trial Court and are summarized as follows:

1. The Court erred in overruling the plea of Edward E. Bessette to the jurisdiction of said Circuit Court over the person of said Bessette in the matter of said petition.

2. The matters charged in the petition for a rule against Bessette to show cause do not constitute a crime.

3. The matters charged against Bessette, testimony tending to prove which was given at the trial, do not constitute a crime.

4. The matters charged against Bessette as a contempt for violating the restraining order, testimony tending to prove which was given at the trial, do not constitute an offense against the administration of justice as required to be administered by the Circuit Court of the United States for the District of Indiana, punishable by fine for the use and benefit of the United States.

5. That the matters charged as contempt of Court for violating said restraining order as against Bessette, as appears by the testimony upon the trial, occurred and were committed, if they ever occurred or were committed, within the northern division of the District of Illinois and not within the District of Indiana; and that by the sixth amendment of the Constitution of the United States, Edward E. Bessette can not be tried upon said charges in the Circuit Court of the United States for the District of Indiana.

204 6. That the United States Circuit Court for the District of Indiana had no jurisdiction to enter a rule against Edward E. Bessette to show cause why he should not be punished for contempt of Court in violating said restraining orde.

7. That the Circuit Court for the United States for the District of Indiana erred in not discharging the said Edward E. Bessette upon the incoming and filing of his verified answer to the rule to show cause.

8. That the Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the bill for injunction in the cause of The W. B. Conkey Company *vs* James A. Russell *et al.*, No. 10010, in chancery, theretofore filed in said Court.

9. That the Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the restraining order theretofore made and entered by said Circuit Court in the cause of The W. B. Conkey Company *vs.* James A. Russell *et al.*

10. That the Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the Marshal's return to the restraining order theretofore made and entered and issued in said Circuit Court in the said cause of The W. B. Conkey Company *vs.* James A. Rus-
205 sell *et al.*

11. That the Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the affidavit of Henry P. Bogle.

12. That the Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette each of the several and separate parts of the affidavit of Henry P. Bogle to which parts said Bessette made specific objections.

13. The Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette evidence to prove the acts of other persons without sufficient proof of the identification of said Bessette with said acts of said other persons.

14. The Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the affidavit of Michael J. Kennedy.

15. The Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the affidavit of Jake Engle.

206 16. The Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the affidavit of Maximillian Kieser.

17. The Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the affidavit of Charles Minger.

18. The Court erred at the trial of the cause in admitting in evidence over the objection of Edward E. Bessette the affidavit of Daniel J. Sheehan.

19. The Court erred at the trial of the cause in admitting in evidence over the objection of said Edward E. Bessette each of the affidavits of John B. Horton.

20. The Court erred in the trial of the cause in admitting in evidence over the objection of Edward E. Bessette so much of the affidavit of Alfred E. Wilcox as tended to state

the damages suffered and sustained by the W. B. Conkey Company.

21. The Court erred at the trial of the cause in sustaining the objections of the W. B. Conkey Company to the admission in evidence of the affidavit of Ida Adams and in excluding the evidence offered.

207 22. The Court erred at the trial of the cause in sustaining the objections of the W. B. Conkey Company to the admission in evidence of the affidavit of John Dunlavey and in excluding the evidence offered.

23. The Court erred at the trial of the cause in sustaining the objections of the W. B. Conkey Company to the question put to the witness, James M. Lynch, by counsel for Edward E. Bessette as to a controversy between the International Pressmen and Assistants' Union and the International Brotherhood of Bookbinders on one hand and the International Typographical Union on the other hand as to the registered label of the Allied Printing Trades Council, and in excluding the evidence offered.

24. The finding of the Court is not sustained by sufficient evidence.

25. The finding of the Court is contrary to law.

BRIEF OF THE ARGUMENT.

In the third and fourth questions stated in the certificate, a line of demarcation between civil and criminal, or private and public, contempt is suggested which the appellant contends is illustrative, not only of the true state of the law, but also of some of the transgressions upon his rights by the trial Court. It will not be controverted that if there be a right of appellate review, the nature of that right is to be determined from the character of the proceeding in the trial Court. If the trial record properly presented a question arising in a suit in equity the Appellate Court would review the record on appeal. On the other hand, if the trial record properly presented a question arising in an action at law, or in a

criminal case, the Appellate Court would review the record on a writ of error or certiorari. So, it appears that the first duty we have before us is to determine whether the proceeding against Mr. Bessette in the Circuit Court was in its nature civil or criminal; whether the contempt charged was in its nature private or public; whether the proceeding contemplated a remedial fine for the use and benefit of the W. B. Conkey Company or a punitive fine going to the United States.

Some recent State cases have so aptly pointed out the distinctions which exist between the two classes of contempt that I shall be content to cite them rather than to state the various rules abstractly, or to burden the Court with many authorities.

Lester vs. People, 150 Ill. 408; S. C. 41 Am. St. Rep. 375, was an appeal from an order fining Lester for contempt of Court for refusing to comply with an order for the production of papers. Held: Civil contempt and reviewable on appeal upon entering a judgment of conviction and imposing a fine.

People vs. Court of Oyer and Terminer, 101 N. Y. 245, was a writ of certiorari to review a judgment convicting and fining a juror for contempt. Speaking of the two classes of contempt the Court said: "In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the Court, and has established a claim upon its protection; and which result in a money indemnity to the litigant, or a compulsory act or omission enforced for his benefit. In these cases the authority of the Court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as punishment, but

as a means to an end, and that end the benefit of the suitor in some act or omission compelled which are essential to his particular rights of person or property. * * * These cases have been usually described as proceedings for the enforcement of civil remedies and more briefly as civil contempts; and because the great volume of instances occur in the progress of civil actions; but they may also occur in criminal actions or proceedings as we shall presently see, and constitute then what I imagine the learned counsel for the appellant had in his mind when he spoke of "*quasi* civil contempts." If we describe this first class of contempts as private contempts because their occasion and result is primarily, and in the main, the vindication of private rights, we shall avoid confusion or misapprehension. The second class of contempts consists of those whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice and not in the interest of an individual litigant. In these cases if a fine is imposed its maximum is limited by a fixed general law and not at all by the needs of individuals; and its proceeds when collected go into the public treasury and not into the purse of an individual suitor. The fine is punishment rather than indemnity, and if imprisonment is added, it is in the interest of public justice and purely as a penalty and not at all as a means of securing indemnity to an individual. Necessarily these contempts in their origin and punishment partake of the nature of crimes, which are violations of public law and end in the vindication of public justice; and hence are named criminal contempts."

Holbrook vs. Ford, 153 Ill. 633, was an appeal from a judgment convicting a creditor of contempt of Court for attaching property in the custody of a receiver. Held: Civil contempt, and an appeal from the order of commitment was entertained.

Farmers Loan and Trust Company vs. Bankers and Merchants Telegraph Co., 148 N. Y. 315, was an appeal from a decree in which it was shown that an attaching creditor was amenable for contempt in disturbing the possession of a receiver. The Court of Appeals reviewed the order on appeal.

Remedial fines, imposed for the vindication of the private rights of suitors, have been reviewed by this Court on appeal. See Brown on Jurisdiction, secs. 118, 119.

Worden vs. Searles, 121 U. S. 14, was an appeal from a decree in equity. In the course of the suit orders had been entered imposing fines for contempt. This Court reviewed the judgments entered in the contempt proceedings and pointed out some of the distinctions which exist between those cases in which the proceedings are remedial and those wherein punishment is sought.

In *Seaward vs. Paterson*, 76 Law T. (N. S.) 215, decided by the Court of Appeal in England it was held that one not a party to an injunction could be punished for contempt only in the event his acts arose to the magnitude of obstructing the administration of justice. Commenting on the distinctions between the two classes of contempt the Court said:

> "Murray was not a party, either first or last. Now, let us pause and consider upon what jurisdiction the Court can proceed against Murray. There is no injunction against him. He is no more bound by that injunction than any other member of the public. He is, however, bound, like other members of the public, not to interfere with and not to obstruct the course of justice, and the case made against him must be this, if anything; not that he has technically infringed the injunction, which has not been granted against him in any sense of the word, but that he has been aiding and abetting others in setting the Court at defiance, and deliberately treating the order of the Court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is

no jurisdiction to attach him for contempt as distinguished, from a breach of the injunction which has a technical meaning. * * * The notice of motion to commit for breach of injunction, which is technically wrong unless he is bound by the injunction, and the notice of motion to commit a man for contempt of Court and not because he is bound by the injunction by being a party to the case or anything of that kind, but because he is conducting himself so as to obstruct the course of justice, are totally different things. The difference is very marked. In one case the party who is bound by the injunction is proceeded against. The proceedings against him are for the purpose of enforcing the order of the Court for the benefit of the person who got the order. In the other case the Court will not allow its process to be set at naught, and treated with contempt. The consequence is this: That in the one case the party who is interested in enforcing the order is enforcing it for his own benefit, while in the other case, if the order of the Court has been contumaciously set at naught, he can not settle it with the person so acting, and save that person the consequence of his act. The difference between the two kinds of contempt is well known, although in some cases there may be a little difficulty in saying on which side of the line they fall."

In *Phillips vs. Detroit*, 19 Fed. Cas. 512, Mr. Justice Brown, then on the Circuit, commenting on the two classes of contempt, said: "In *Wellesley vs. Earl of Mornington*, 11 Beav. 180, 181, an injunction was issued against the defendant, but it did not extend in terms to 'his servants and agents.' A motion having been made to commit his agent for a breach of the injunction, it was held irregular; but it was afterwards decided that if he had knowledge of the writ he might be committed for the contempt, although not for the breach of the injunction. See also *People vs. Sturlevant*, 9 N. Y. 263, 267; *Bank Com'rs vs. City Bank of Buffalo*, 6 Paige, 497; 1 Barb. Ch. Pr. 633; High Inj. sec 853, 854, 862, 863; *Safford vs. People*, 85 Ill. 558."

The foregoing authorities are sufficient, it would seem, to warrant the answer that prior to the act of Congress creating Circuit Courts of Appeals, an appeal would lie to review a judgment committing for contempt in civil or private cases. It is a question of first impression whether under the statute the Circuit Court of Appeals may exercise that jurisdiction which was formerly exercised by this Court. The Court of Appeals is a statutory Court and the act gives it jurisdiction of all appeals and writs of error other than those which lie to this Court. It seems that the true rule is that unless the contempt proceeding presents some question exclusively cognizable by this Court that the jurisdiction as between this Court and the Court of Appeals is to be determined from the record in the suit to which the contempt proceeding is auxiliary; that this Court should exercise the jurisdiction if it have, under the law, the jurisdiction of the principal suit; that the Court of Appeals should exercise the jurisdiction if it have, under the law, the jurisdiction of the principal suit.

If this Court shall do more than give an abstract answer to the questions certified by the Court of Appeals; if this Court shall make an exposition of the law by its answers, applying them to this case we are persuaded it will find that this proceeding was carried on in the trial Court under the administration of the W. B. Conkey Company, whose counsel directed the service and return of process, assembled the evidence, conducted the trial and are here resisting the rights of the appellant. The nature of the charge, as well as the circumstances of the administration of the case, will convince this Court that the proceeding is civil. If we look to the law for an exemplification of criminal contempt, it will be found that the limitations in that branch of jurisprudence exclude this case from that class. Congress has not abandoned the Courts to

their own ingenuity to determine what may be offenses against them, nor has Congress required the Courts to contrive how they shall protect the administration of justice against obstruction.

Before passing to the various acts of Congress let us briefly survey the common law, to determine how the Courts of England looked upon efforts to thwart the correct administration of justice and what the duties of Congress were in the matter of conserving the administration of justice.

The statute, 33 Edward I, *de conspiratoribus*, was in these words:

> "Conspirators, be they that do confeder, or bind themselves by oath, covenant or other alliance, that every of them shall aid and bear the other falsely and maliciously to indite, or cause to indite, or falsely to move or maintain pleas; and also, such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees to maintain their malicious enterprises; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which, by their seignory office or power, undertake to bear or maintain quarrels, pleas or debates that concern other parties than such as touch the estate of their lords or themselves."

The annals of jurisprudence leave no doubt as to the antiquity at common law of the offenses described by the statute. In 3 Coke's Institutes 143, and 1 Hawk. P. C. 193, Chap. 72, Sec. 9, it is said that the villenous judgment is given by the common law, and not by any statute against those convicted of a conspiracy. The villenous judgment was known only to the common law. It never could have been given unless conspiracy was an offense punishable at common law. In the twentieth year of the reign of Edward I, a civil remedy was provided against conspirators by the writ of conspiracy, and the statute of 28 Edward 1, Chap. 10, en-

titled, "The remedy against conspirators, false informers and embracers of juries," makes this further provision: "In right of conspirators, false informers and evil procurers of dozens, assizes and juries, the king hath povided remedy for the plaintiffs by writ out of the chancery, notwithstanding he willeth that his justices of the one bench and of the other, and justices assigned to take assizes, when they come into the country to do their office, shall, upon every plaint made unto them, award inquests thereupon without writ, and shall do right unto the plaintiffs without delay." The first clause of this statute must have reference to the writ of conspiracy provided for in the twentieth of Edward I, because there does not appear to be any other such writ, and according to 2 Institutes 562, it was but an affirmance of the common law. These provisions for private remedies against conspirators came to us as a part of the common law. And it is clear that the statute does not embrace all the grounds covered by the common law, because it was never questioned that a conspiracy to commit any felony, as to rob or murder, etc., or a misdemeanor, as to cheat by false public tokens, etc., was an indictable offense. The statute was treated in England as being declaratory of the common law only so far as it went, doubtless for the purpose of removing questions which may have existed in relation to the conspiracies it enumerated, and it left to the common law possession of the ground occupied by it, beyond the provisions of the statute. In the Book of Assizes, 27 Edward III, Chap. 44, it is said that "inquiry shall be made concerning conspirators and confederates who bind themselves by oath, covenant, or other agreement, that each will support the enterprises of the other, whether true or false." The position that "a confederacy, each to maintain the other, whether the matter be true or false," is a common law offense, is distinctly adopted in 1 Hawk. P. C. 190, Chap. 72, and 9 Coke's Rep. 56 (the Poulterer's case), and the

principle of the case noted in the Book of Assizes, namely: That conspiracies are punishable at common law, though nothing be put in execution, is fully recognized in the Poulterer's case, and this further principle is also laid down, that the law punishes the conspiracy "to the end to prevent the unlawful act." On an information against Breeton, Townsend et al., Noy 103, for the suppression of a will to the prejudice of Egerton, all the defendants but one were convicted and fined. This was a case of fraud effected by a conspiracy, and the injury was to an individual. The suppression of a will by one was not an indictable offense, but it was a fraud highly injurious to the party affected by it. It was the confederacy alone which rendered the suppression of the will criminal, and therefore the information was against the offenders jointly. In *Timberly vs. Childe*, Sid. 68, the indictment was for a conspiracy to blackmail, and on motion to quash the indictment was held good. In *Child vs. North*, 1 Keble 203, the indictment was for a conspiracy to deprive the prosecutor of his fame, and to extort money, and it was held, on a motion to quash, that the conspiracy was punishable, though the Court had no cognizance of the matter to accomplish which the conspiracy was formed. And in the same case, 1 Keble 254, on a motion in arrest, it was held that a crime was charged, although the parties to the conspiracy directed their mischief toward a subject matter beyond the jurisdiction of the Court. In *The Queen vs. Armstrong*, 1 Vent. 304, it was again held that the conspiracy was the gist of the offense. In *The Queen vs. Best*, 2 Ld. Raym. 1167, it was held, on demurrer, that a bare conspiracy was indictable. In these cases the meditated end was not accomplished by the conspirators, and therefore the conspiracy for an unlawful purpose was the offense for which the defendants were punished.

"Every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation, lest the grand jury should find a bill for one offense, and the party be put upon his trial for another, without any authority." (1 Chitty's Crim. Law, 169.) And "the charge must be sufficiently explicit to explain itself, for no latitude of intention can be allowed to include anything more than is expressed." (Id. 172, 2 Burr. 1127.) In *King vs. Parsons*, 1 Bl. Rep. 392, there was a conspiracy raised to take away the character of an individual, and accuse him of murder by means of a mere phantom, having no reality, and being the mere pretense of communication with a ghost, yet the actual fact of conspiring was left to the jury to be determined according to the circumstances. The only object of the conspiracy in that case was to injure the man's reputation. In *King vs. Rispal*, 1 Bl. Rep. 368; 3 Burr. 1320, the conspiracy charged had for its object to extort money from an individual by charging him with having taken a quantity of human hair out of a bag. Upon objections, Lord Mansfield said: "The crime laid is an unlawful conspiracy; this, whether it be to charge a man with criminal acts, or such only as may affect his reputation, is fully sufficient." In *King vs. Skirret*, 1 Sid. 312, the defendants were prosecuted for reading a release to an illiterate man, in other words than those in which it was written, by which he was induced to sign it. The case was not within the statute, 33 Edward I, but the action was maintained. In *Queen vs. Mackarty*, 2 Ld. Raym. 1179, 2 East's C. L. 823, the defendants were prosecuted for selling wine under a false brand, and that action was not within any of the statutes. In *King vs. Wheatly*, 2 Burr. 1127, conspiracies to cheat were held to be unlawful. In *The Queen vs. Orbell*, 6 Mod. 42, the

indictment was for a combination to cheat an individual out of his money by getting him to bet a sum on a foot race, and prevailing on the party to run booty. The Court sustained the indictment on the ground that "being a cheat, though it was private in the particular, yet it was public in its consequence." In *The King vs. Edwards*, 8 Mod. 320, the parties were indicted for giving money to a man to marry a poor, helpless woman, incapable of marriage, for the purpose of gaining a parish settlement for her. In that case there was a motion to quash the indictment, on the ground that it was unlawful to marry a woman and give her a portion, but the object of the conspiracy being to impose a pauper upon the parish the action was sustained. In *King vs. Cope*, 1 Str. 144, the prosecution was for a conspiracy to ruin the trade of the card-maker to the King, by bribing his apprentices to put grease into the paste, whereby the cards were spoiled. The putting of grease into paste, if done by an individual, would not have been a crime, but a mere private injury, for which the party would have been left to his civil remedy, but the conspiracy was held to constitute an offense. In *The King vs. Eccles*, 1 Leache's C. C. 274, the indictment was for a conspiracy to impoverish a tailor. The action was sustained, and the case became a leading one in jurisprudence. In *The King vs. Leigh*, 2 Macklin's Life 217, it was held that an indictment would lie for a conspiracy to impoverish an actor by driving or hissing him off the stage, and the same rule was enforced in a like case, in *Clifford vs. Brandon*, 2 Campb. 358. In *The King vs. Robinson*, 1 Leach's C. C. 37, the defendants were indicted for a conspiracy to raise a false title in Mary Robinson to the estate of Richard Holland, by marrying Taylor under the assumed name of Richard Holland. If the defendants in that case meditated a perversion of the course of justice, as her right to Hammond's es-

tate could only have been established by judicial proceedings, it was not so charged. The action, however, was maintained because the purpose of the conspiracy was not of the gist of the crime. Otherwise the action must have failed, for "no latitude of intention can be allowed to include anything more than is expressed in an indictment."—Lord Mansfield, *The King vs. Wheatly*, 2 Burr. 1127; I Chitty's Cr. Law 172. In *The King vs. Berenger*, 3 Man. & Sel. 68, an indictment was sustained in which the conspiracy charged was to defraud the public and the conspiracy was held to be the gist of the action. In *The King vs. Mawbry*, 6 T. R. 619, there was a conspiracy to pervert the course of justice, and the offense was held to lie at the common law. By a course of decisions in England running through a space of more than four hundred years, from the reign of Edward III to the 59 George III, without a single conflicting adjudication, these points are clearly settled: 1. That the offense of conspiracy is of common law origin, and not restricted or abridged by the statute, 33 Edward I. 2. That a conspiracy to do any act that is criminal *per se*, is an indictable offense at common law, for which it can scarcely be necessary to offer any authority. 3. That an indictment will lie at common law—*first*, for a conspiracy to do an act not illegal nor punishable if done by an individual, but immoral only, as in *The King vs. Lord Gray*, and the case of *Sir Francis Blake Delaval; second*, for a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public, as in *The King vs. The Journeymen Tailors of Cambridge*, for a conspiracy to raise their wages, either of whom might legally have done so, and *The King vs. Edwards; third*, for a conspiracy to extort money from another, or to injure his reputation by means not indictable if practiced by an individual, as by verbal

defamation, and that whether it be to charge him with an indictable offense or not, as in *Timberly vs. Childe; Child vs. North: The Queen vs. Armstrong; The Queen vs. Best; The King vs. Kinnersly; The Queen vs. Martham Brain; The King vs. Parsons*, and *The King vs. Rispal; fourth*, for a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat, if effected by an individual, as in *Breerton vs. Townsend; The King vs. Shirrett; The Queen vs. Mackarty; The Queen vs. Orbell; The King vs. Wheatly*, and *The King vs. Lara; fifth*, for a malicious conspiracy to impoverish or ruin a third person in his trade or profession, as in *The King vs. Cope; The King vs. Eccles; The King vs. Leigh; Macklin's* case, and the case of *Clifford vs. Brandon; sixth*, for a conspiracy to defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured, as in *The King vs. Robinson, The King vs. Berenger* and *The King vs. Edwards; seventh*, for a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time, as in *The King vs. Gill; eighth*, that a conspiracy is a substantive offense, and punishable at common law, though nothing be done in execution of it, as in the Book of Assizes, ch. 44; *Poulterer's* case; *The King vs. Edwards; The King vs. Eccles; The King vs. Berenger*, and *The King vs. Gill*, and all the authorities, that the conspiracy is the gist of the offense; and, *ninth*, that in a prosecution for a conspiracy it is sufficient to state in the indictment the conspiracy and the object of it, and that the means by which it was intended to be accomplished need not be set out, being only matters of evidence to prove the charge, and not the crime itself, and may be perfectly indifferent, as in *The King vs. Eccles; The King vs. Gill.*

From all which it results that every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious or corrupt purpose, or for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense, though nothing be done in execution of it, and no matter by what means the conspiracy was intended to be effected, which may be perfectly indifferent, and makes no ingredient of the crime, and, therefore, need not be stated in the indictment. In 1 Tremaine's P. C. 82, 83, there is an information against Turner and others for a conspiracy to destroy the reputation of one George Green, and falsely to charge him with adultery with the wife of one of the conspirators, for the purpose of extorting money from him. In 86, against Record and others, for a cheat practiced on Lady Dorothea Seymour, in prevailing on her by means of a falsehood, to advance large sums of money to them. In 91, against Wilcox and others, for cheating by conspiracy one John Dutton, of a quantity of cloth, under pretense of buying it. In 94, against Taydler and others, for a cheat by conspiracy, in drawing an absolute conveyance to themselves of the estates of two women, and persuading them to execute it, pretending it was only in trust for the women, etc. And in 97, against Allibon and others, for cheating by conspiracy one Hilliard, in obtaining divers bonds from him, for the payment of money to themselves and others, as a consideration for procuring a marriage between him and an indigent woman, whom they represented as being rich.

In neither of those cases could an indictment have been sustained for the same injury practiced by an individual without the aid of conspiracy or combination; and, as Tremaine gives the terms, the reigns and the names of the respective parties, there can be little doubt that they are precedents of informations in adjudicated cases,

and that they were held to be good; and they go far to show how the common law was understood in England in the reigns of Charles and James II. And the law of conspiracy, as settled by the uniform tenor of the decisions of the courts in England, has been recognized and adopted as the common law by the courts of several of the States of the United States, as in *The Commonwealth vs. Judd*, 2 Mass. 329, and *The Commonwealth vs. Tibbetts*, 2 Mass. 536.

The foregoing cases show the law in England, both before and after the formation of our Government. In 1812 the Supreme Courts of the United States came to consider whether Circuit Courts of the United States had a common law jurisdiction in criminal cases, and it was held that no such jurisdiction existed (*United States vs. Hudson*, 7 Cranch 32.)

Such, then, may be said to have been the state of the law when Congress began to define public offenses. On the 2nd day of March, 1831, Section 5399 of the R. S. was enacted, as follows:

> "Every person who corruptly, or by threats or force, endeavors to influence, intimidate or impede any witness or officer in any Court of the United States, in the discharge of his duty, or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein, shall be punished by a fine of not more than five hundred dollars or by imprisonment not more than three months, or both." (Sec. 5399 U. S. R. S.)

On June 10, 1872, Section 5404 of the Revised Statutes was enacted, defining the obstruction of justice by corrupt means. On April 20, 1871, Sections 5406 and 5407, concerning conspiracies to defeat the enforcement of laws, were enacted. These various statutes appear to be ample to punish all offenders against the administration of justice who could possibly be within the scope of this appeal. The acts of Congress to which we thus refer are all

subsequent to the enactment of Section 725, concerning the power to punish for contempt. Section 725 was enacted on the 24th of September, 1789. If Section 725 were broad enough to cover, if it contemplated the determination of all matters which tended to the obstruction of justice, then Congress did an idle and foolish thing in the enactment of the various subsequent statutes to which I have referred. But did Congress do such an idle and foolish thing? In *ex parte Robinson*, 19 Wall. 505, the Supreme Court construed Section 725 as a limitation upon the powers of the Courts to punish for contempt, and, on page 511, the Court said:

> "The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the powers of these Courts in this respect to three classes of cases: First, where there has been misbehavior of a person in the presence of the Courts, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the Courts in his official transactions; and, third, where there has been disobedience or resistance by any officer, party, juror, witness or other person to any lawful writ, process, order, rule, decree or command of the courts. As thus seen the power of these courts in the punishment of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes."

In re Chiles, 22 Wall. 157, the Court again construed Section 725, and, at page 168, Mr. Justice Miller said:

> "Section 725 of the Revised Statutes declares that the courts of the United States shall have power to punish by fine and imprisonment for contempts of their authority. And among the cases specially enumerated are 'disobedience or resistance by any officer of the Court, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts.' Such has always

been the power of the courts, both of common law and equity. The exercise of this power has a twofold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the Court or its order; and, the second, to compel his performance of some act or duty required of him by the Court, which he refuses to perform."

In 1888 the Supreme Court came to consider these relative statutes, and it held that a person might be punished for a contempt of court in doing an act which affected the administration of justice, though the act affecting the administration of justice was an indictable offense. But the Supreme Court, speaking by Mr. Justice Harlan, called attention to the fact that the powers of the Court under the judiciary act of 1789 had been limited by a subsequent act to those cases where the wrongdoing was proximate to the Court, and the subsequent statute was quoted, as follows:

"That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness or any other person or persons, to any lawful writ, process, order, rule, decree or command of the said courts.

"Sec. 2. That if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate or impede any juror, witness or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by im-

prisonment not exceeding three months, or both, according to the nature and aggravation of the offense."—*In re* Savin, Petitioner, 131 U. S. 267.

On page 275 the Court further says:

"The act of 1789 did not define what were contempts of the authority of the courts of the United States in any cause or hearing before them, nor did it prescribe any special procedure for determining a matter of contempt. Under that statute the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation. The act of 1831, however, materially modified that of 1789, in that it restricted the power of the courts to inflict summary punishments for contempt to certain specified cases, among which was misbehavior in the presence of the Court, or misbehavior so near thereto as to obstruct the administration of justice. *Ex parte* Robinson, 19 Wall. 505, 511."

In considering "contempt of court" I shall not refer to direct contempt nor to that form of indirect contempt, which is predicated upon an interference with property in the custody of the Court. I shall disregard as irrelevant to the questions now before this Court all those cases which proceed upon the theory of an interference with property *in custodia legis*, because I believe that there is a substantial difference in jurisprudence between the *res* of litigation and the mere *lis*. I believe the difference which distinguishes the two is analogous to the difference between the procedure and the subject matter of litigation. I believe it is akin to the difference that exists between a proceeding *in rem* and a proceeding *in personam*. These differences, which I believe exist, are relative and illustrative. *Arthur vs. Oakes*, 63 Fed. Rep. 310, is a case illustrating the province and powers of a court of equity to protect property and administer

estates confided to the Court. In *Hovey vs. Elliott*, 167 U. S. 409, this Court construed so much of the act of Congress as pertained to the manner in which a penalty could be imposed for the violation of an order of Court. It was held that the statute was a limitation, and the authorities are reviewed, which point the distinction between the powers of Federal Courts, and the powers of other courts, with respect to the matter now under inquiry.

What were the functions of the restraining order entered in this cause; what were its limitations, if any, for out of the solution of these questions the rights of Mr. Bessette are to be determined, if he have any rights?

Were there any limitations upon the Court in the matter of this restraining order, and if so, what were they?

Could the Court in making the order act without a limitation as to the persons to be affected, or as to the purposes to be accomplished by the restraining order?

The order could not lawfully discharge the functions of a public proclamation. The Court could not act without a stimulus to its functions such as the law prescribes is essential to invoke jurisdiction. There must be an issue, or a pleading tendering an issue, upon which the Court acquires power to command the persons who may be challenged by the pleading to speak, and who by that challenge are entitled to be heard. (*Hovey vs. Elliott*, 167 U. S. 409.) In this instance, as in all others where the matter of jurisdiction has been properly considered, the jurisdiction of the Court was confined to the subject matter of the controversy and to the persons between whom that controversy was waged. The essential purpose of the restraining order was to define the lines of conduct which *certain* persons might lawfully pursue until the Court could hear and determine the cause upon its merits. I ascribe only that force to

the word *certain* as a limitation upon the persons to be affected, which the law of the English-speaking people has ascribed. The lower Court itself seems to have found that *the element of defense was essential to jurisdiction*, otherwise the Court might have ordered its proclamation issued without any evidence or any hearing. And it was likewise essential to jurisdiction that particular persons be challenged as defendants, otherwise persons having no interest in the subject matter might be brought as straw men before the Court and an adjudication had which would be a great wrong to persons who were specially interested in the subject of the controversy, but who were not before the Court. The force of this suggestion must be impressive when one considers, as the lower Court considered it in this case, that one not named as a party to the bill nor designated as one of any class who might have been named has no authority or right to challenge the justice or to exemplify the injustice of the restraining order or to disapprove the facts upon which it purports to be fabricated.

The purposes of the restraining order were limited as to time and as to cause. The temporal limitation confined the force of the restraining order to the period between its issue and the date upon which the Court might give a further hearing. The cause involved in the issue was exemplified by the restraining order, and to hold otherwise would mean that because the Court had spoken upon one thing it must be deemed to have spoken upon all things. Now, if we are to analyze the restraining order, we must look to the persons who were sought to be affected by it, to the manner in which they were to be affected, and to the causes as to which they were to be affected. We find that certain persons were named as defendants to the bill for an injunction. That was the first limitation. At this point the Court bowed to that principle of jurispru-

dence which has arisen out of the law of necessity, and allowed the complainant to challenge not only particular persons, but also classes of persons. The first class of persons involved by this rule of necessity in this suit was described as those "confederating" with the named defendants. The second class was described as the "agents and servants" of the named defendants. These two classes are separate and distinct. A confederate is a principal and he acts as a principal. An agent of servant acts not in his own right, but in a character that is purely representative. He acts not for himself nor for his own cause, but for the person and cause of another. (*Iveson vs. Harris*, 7 Ves. 256; *Wellesley vs. Mornington*, 11 Beav. 181; *Hodson vs. Coppard*, 29 Beav. 4; *Sedgwick vs. Redman*, Cary 44; *Wimpy vs. Phinizy*, 68 Ga. 188.)

The statutes which created the lower Court and breathed the life of jurisdiction into its lungs, placed a limitation upon the powers of the Court (*Ex parte Robinson*, 19 Wall. 505), which in this case confined the Court's right to speak only to the W. B. Conkey Company and such others as were citizens and residents of the State of Indiana. The complainant seems to have appreciated the potency of this limitation, because in his bill for injunction he described the defendants as "*residents of the city of Hammond, in the State of Indiana, and citizens of the State of Indiana.*" (Record, page 3, last 3 lines of Art. 1 of the bill.) And again in Article 8 of the bill for injunction (Record, page 7), when the complainant came to his averment of confederacy, he said in his bill, "That said Harry Alting then and there proceeded to carry out and did so far as he has been able to do, carry out and execute his said threats, and in pursuance of such purpose and design, *did then and there conspire and confederate with divers irresponsible persons residing in the city of Hammond* (but whose names are un-

known to your orator and who are not employed in or in any wise connected with or interested in your orator's factory or business) to carry out, and *did then and there, acting in concert with said divers irresponsible persons, carry out,*" etc.

Again, in the same article of the bill, it is said "that said thirty-eight employes have now joined in said conspiracy *with said Harry Alting and his said confederates*, and have conspired and confederated with, and are now conspiring, confederating with and acting in concert with said Harry Alting and his confederates, and with each other," etc.

Again, in Article 9, the bill speaks of said Harry Alting and "said confederates." (Record, page 8.)

Again, in Article 10, the bill mentions "said confederates." (Record, page 9.)

In Article 1 of the petition for attachment the complainant avers that he filed his bill against James A. Russell et al., "named as defendants therein, charging, among other things, that said defendants had conspired, confederated, and were then and there conspiring and confederating with each other, and with divers other persons whose names were then and are now unknown to your petitioner," etc. (Record, page 34.)

Reading together these two descriptions of the classes of persons who were confederating, together with the statute giving jurisdiction because of diverse citizenship, the conclusion is forced that the averment confined the issue to *defendants who were residents and citizens of the city of Hammond, in the State of Indiana.* The concluding sentence of Article 1 of the petition for attachment is as follows: "That your petitioner begs leave to refer to said bill of complaint for greater accuracy as to the matters and things therein set forth, and as to the relief therein prayed."

It was solely upon the ground of diverse citizenship that the Court below acquired jurisdiction. By implication of law as well as by the express averments of the complaint, the right of the Court to pronounce judgment in this instance was so restricted as that it could pronounce judgment only against persons who were citizens and residents of the State of Indiana, except, of course, it found against plaintiff.

The petition for attachment says of Mr. Bessette that he was not named as a defendant in the bill of complaint (Record, page 37, Art. 6, petition for attachment), and it further says of him, upon the information and belief of the petitioner, that he is a resident of the city of Chicago (Record, page 45; petition for attachment, Art. 22).

Recurring again to the violation of the restraining order, we find that it was issued upon the application of a private suitor, in a private action, to redress a private wrong. (*Worden vs. Searls*, 121 U. S. 14.) No question of the public welfare was involved, and the case of Debs and similar cases are not controlling. (*In re Debs*, 158 U. S. 564.)

The restraining order is peculiarly drawn with respect to distribution of prohibited acts among the defendants. Some of the prohibited acts are enjoined upon "the defendants, their confederates and servants," while others of the prohibited acts are expressly enjoined upon the defendants alone. Beginning after the first colon in the first clause of the restraining order (Record, page 30), the names of various defendants are stated, and they and their confederates and servants are enjoined from doing each of the following acts, namely, "from in any manner interfering with, hindering, obstructing or stopping any of the business of said W. B. Conkey Company," etc., "or its agents, servants or employes in the

operation of the factory and business of said W. B. Conkey Company, located," etc. (Record, page 31.)

"Also from entering upon the grounds, factory or premises of said W. B. Conkey Company, etc., for the purpose, etc." (Record, page 31.)

"Also from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of the employes of said W. B. Conkey Company to refuse or fail to do their work or discharge their duties as such employes," etc. (Record, page 31.)

"Also from compelling or inducing or attempting to compel or induce by threats, intimidation, force or violence any of the employes of said W. B. Conkey Company to leave the service," etc. (Record, page 31.)

"Also from preventing or attempting to prevent any person or persons by threats, intimidation, force or violence from freely entering into the service and employment or continuing in the service and employment of," etc. (Record, page 31.)

"Also from compelling or inducing or attempting to compel or induce by threats, intimidation, force or violence the said W. B. Conkey Company against its will or the will of its officers employing or discharging any person or persons whomsoever." (Record, page 31.)

"Also from doing any acts whatsoever in furtherance of any conspiracy or combination to restrain or obstruct either said W. B. Conkey Company or any of its officers or employes in the free uninterrupted and unhindered control and direction of the business and affairs of said W. B. Conkey Company." (Record, pages 31-32.)

"And from ordering, directing, aiding, assisting or abetting in any manner whatsoever any person or persons to commit any or either of the acts aforesaid." (Record, page 32.)

The foregoing are *expressly enumerated as the acts which were prohibited with respect to the defendants and other persons.*

Following the enumeration of those acts the restraining order appears to have been drawn upon a different theory. *The element of confederacy is thereafter omitted, and the restrictions are expressly*

confined to the defendants alone, and not to the defendants in conjunction with other persons. Among the acts which the defendants alone are restrained from doing (Record, page 32) are, "congregating or being upon or about the sidewalks, streets, alleys, approaches or places adjoining or adjacent to said factory and the premises of said complainant in the city of Hammond, or upon or about said factory or the grounds belonging to the same or used in connection therewith, for the purpose of intimidating the employes of said W. B. Conkey Company or any of its officers or agents, or preventing them or any of them from rendering their services or discharging their duties to said W. B. Conkey Company."

"Also from inducing or coercing by threats, force or violence any employes of said W. B. Conkey Company to leave the service or employment of said W. B. Conkey Company." (Record, page 32.)

"Also from in any manner interfering with or molesting any person or persons who may be employed by or may be seeking employment with said W. B. Conkey Company in the operation of its said factory and business." (Record, page 32.)

"Also from in any manner interfering with said W. B. Conkey Company in carrying on its business in its usual and ordinary way." (Record, page 32.)

"Also from collecting, either singly or in company with others, in and about the approaches of the factory and buildings of said W. B. Conkey Company for the purpose of patrolling or controlling or guarding the streets, entrance gates and approaches to the property of the said W. B. Conkey Company for the purpose of intimidating, threatening or coercing any of the employes of said W. B. Conkey Company or any person or persons seeking employment with said W. B. Conkey Company." (Record, page 32.)

"Also from interfering with the employes of said W. B. Conkey Company in going to and from their daily work at said factory of the complainant, W. B. Conkey Company." (Record, page 32.)

"Also from going, either singly or collectively, to the homes of the employes of said W. B. Conkey Company, or of any or either of

them, for the purpose of intimidating or coercing any or all of said employes to leave the employment or service of said W. B. Conkey Company, or from entering into the employment or service of said W. B. Conkey Company, and as well from intimidating or threatening in any manner the wives and families of said employes at their said homes or elsewhere." (Record, pages 32-33.)

The character and scope of this restraining order must also be determined in the light of the familiar principle that a Court cannot, under the guise of proceedings for contempt, enlarge and extend the scope of its injunction, nor make it *ex post facto*, but must give to the order a strict construction.

"To make an order now, and then punish for contempt or disregard of it before it was made, is *ex post facto* legislation and judicial enforcement at the same moment." (Mr. Justice Miller, *in re Chiles*, 22 Wall., at page 169. See also *U. S. vs. Atchison Ry. Co.*, 16 Fed. Rep. 853.)

This is only a different statement of the rule that the judgment to be valid must strictly conform to the pleadings. *Miller vs. Schaefer*, 75 Ill. App. 389; *Graham vs. Bates*, 45 S. W. 465; *Ramsey vs. People's R. Co.*, 144 Mo. 175; likewise that a Court is bound by its record, *Borkenhagen vs. Paschen*, 72 Wis. 272. It is not sufficient that the judgment was supported by evidence if outside of the issue tendered. *Riley vs. Jones*, 43 Va. 43; *Price vs. Boden*, 22 So. 657; *Catheral vs. Griere*, 104 Ia. 330; *Foley vs. Foley*, 120 Cal. 33; *Woodgate vs. Fleet*, 44 N. Y. 113; *People vs. Johnson*, 38 N. Y. 63; *Coit vs. Tracy*, 8 Conn. 269; *Tray vs. Hegeman*, 98 N. Y. 358; *Lea vs. Lea*, 99 Mass. 493 (see extended note to this case in 96 Am. Dec. 772); *Reynolds vs. Stockton*, 43 N. J. L. 221, 3 Am. St. Rep. 305; *Seamster vs. Blackstock*, 83 Va. 232; *Anthony vs. Kasey*, 83 Va. 238; *Wade vs. Hancock*, 26 Va. 620; *Ex Parte Lange*, 18 Wall. 163. The protection of the parties require it.

Benze vs. Hines, 3 Kan. 390; *Atchison, etc., R. Co. vs. Jefferson Co.*, 12 Kan. 127; *Bradley vs. Johnson*, 49 Ga. 412; *Howard vs. Kimball*, 63 Me. 308; *Davis vs. Brown*, 94 U. S. 423.

Now consider the nature in law of the petition for attachment. Mr. Bessette is entitled to this because one cannot be arraigned upon one charge and tried upon another. We must look to the pleading upon which the Court acted to ascertain the legal nature of the charge. The cases, *supra*, demonstrate that courts have high regard for the rights of the citizen. Indeed, the whole matter of procedure arises out of the diversity of causes, and to the sense of duty on the parts of the courts, whereby they become competent to administer justice in the particular case. Thus it is said that a Court cannot enlarge its restraining order in a contempt proceeding, nor can a Court bind the rights and interest of a person who is not before the Court, nor can a Court render a judgment that is beyond the issues tendered. In each of the foregoing instances, if the Court assumes to violate the rule, the judgment is unlawful. Public policy requires that this be so, that there may be an end to litigation, and individual rights require it in order that the defense of former jeopardy, *res adjudicata*, estoppel, etc., may be conserved. It has been well said that a matter cannot be regarded as *res adjudicata*, as a general rule, without the concurrence of four conditions, viz.:

(1) Identity of the thing sued for, *i. e.*, the relief; (2) identity of the cause of action; (3) identity of persons and parties to the action; (4) identity of the quality in persons for or against whom the claim is made.

Indirect contempt proceedings may be classified (1) according to the nature of the relief sought, and (2) according to the nature of the charge made in the petition or information. If classified ac-

cording to the nature of the relief sought, we again find that there are two distinct divisions, viz., those wherein a remedial fine is entered for the use and benefit of the party aggrieved (*Worden vs. Searls*, 121 U. S. 14) and those wherein a punitive fine is entered for the use and benefit of the government, at the same time punishing the culprit and vindicating the majesty of the law. In *New Orleans vs. Steamship Company*, 20 Wall. 387, the defendant was fined because he disregarded the Court which stood ready to hear him and went contemptuously into another tribunal. Here Mr. Bessette did not go into another tribunal, and the Court which convicted him would not look to his rights in the premises—"they were wholly immaterial"—but acted upon the unwarranted assumption that the rights of the W. B. Conkey Company were *res adjudicata* and exclusive, and that the only question the Court would determine was: Did Bessette knowingly violate the restraining order?

If contempt proceedings be considered according to the nature of the charge made, *i. e.*, according to the averments in the petition or information, we find again that there are the two distinct classes, viz., those wherein the rights of the complaining party have been outraged (*Worden vs. Searls, supra*) and those wherein the administration of public justice has been obstructed. (*New Orleans vs. Steamship Company, supra.*) An examination of the cases will show uniformly that a remedial fine has been entered when the complaint was made of a transgression upon the rights of the individual in whose behalf the injunction was issued, and that uniformly a punitive fine has been entered when the complaint was also made of an obstruction to the due administration of justice. These distinctions are clearly pointed out in many well-considered cases. Remedial fines for the vindication of private rights were before the Courts in these cases (*Worden vs. Searls*, 121 U. S. 26;

In re Graves, 29 Fed. Rep. 60; *U. S. vs. Berry*, 24 Fed. Rep. 783; *U. S. vs. Ry. Co.*, 16 Fed. Rep. 853; *Van Zant vs. Mining Co.*, 2 McCrary 642; *In re Chiles*, 22 Wall 163; *Durant vs. Supervisions*, Woolw. 377; *New Orleans vs. Steamship Co.*, 20 Wall. 392; *Kirk vs. Milwaukee Manfg. Co.*, 26 Fed. Rep. 508.) The rules by which proceedings against Mr. Bessette may be classified are the following:

(1) According to the parties invoking the jurisdiction in the original bill, *i. e.*, whether private parties, as in *Worden vs. Searls, supra*, or the public, as *In re Debs*, 158 U. S. 564.

(2) According to the subject matter of the averments in the original bill, *i. e.*, whether a public duty had been invaded or disregarded, as *In re Lennen*, 166 U. S. 548, or a private right involved, as in *Worden vs. Searls, supra; Eureka Lake Co. vs. Yuba County*, 116 U. S. 410.

(3) According to the specified transgressions, as they are charged against the particular persons, and in the very peculiar manner in the original bill, *i. e.*, whether as against certain defendants particularly named or defendants, with their confederates, agents, servants, etc.

(4) According to the relief demanded in the original bill (*In re Chiles*, 22 Wall. 163; *Stimpson vs. Putnam*, 41 Vt. 238).

(5) According to the terms of the restraining order (*Vide* cases, *supra*).

(6) According to the parties invoking the jurisdiction in the petition for attachment (*Vide* cases, *supra*).

(7) According to the subject matter of the averments in the petition for attachment (*Vide* cases, *supra*).

(8) According to the specific transgressions charged in the petition for attachment (*Vide* cases, *supra*).

(9). According to the procedure in the petition for attachment (*Vide* cases, *supra*).

In Savin, Petitioner, 131 U. S. 273, the Court reviewed the various acts of Congress relating to the obstruction of the due administration of justice and applied the limitation of the statute, *i. e.*, the transgression must be committed near to the court before the offense can be punishable as contempt. The same rule is followed in Cuddy, Petitioner, 131 U. S. 280. In *Eilenbecker vs. Plymouth County*, 134 U. S. 32, the Court makes it plain that the function of contempt proceedings is to require compliance with or performance of the orders of the Court, rather than to enforce strangers to desist from entering upon the scene, regardless of what their individual rights in the premises may be.

Thus, from every point of view, does it appear that the proceedings against Bessette were civil and private; that the intent was to allow a remedy to the W. B. Conkey Company rather than to redress a public wrong. Indeed, at the trial the Court heard evidence as to the extent of the injury sustained by the W. B. Conkey Company. An exception was taken by Bessette to this action of the Court (Record, pages 279-282), and it is the basis of an assignment of error in the Court of Appeals. (Record, page 121; 20th item in asignment of errors.)

If there could remain any doubt as to the fact that these contempt proceedings were intended to be remedial that doubt would be removed by the provisions of the final decree which the W. B. Conkey Company, in the Circuit Court of Appeals, caused to be brought into the record—contrary to the order of the Court of Appeals, however—in which decree it affirmatively appears that the contempt proceedings against all those who were accused with Bessette, and on whom service was had, were dismissed by the W. B.

Conkey Company on the terms that those transgressors had granted to the W. B. Conkey Company that price which the W. B. Conkey Company demanded from the transgressors. Not the slightest consideration appears to have been given to the outraged dignity of the Court or to the transgressions against the administration of justice (Additional transcript of Record, page 5).

In consideration of the premises it would seem that Bessette's remedy was by appeal, or not at all. Counsel appreciates the force of well considered cases to the effect that orders such as fineing for the violation of an injunction are merely interlocutory and no appeal will lie therefrom. But that rule can not apply here without a denial to Bessette of his day in Court, because Bessette was not a party to the bill and *no final decree ever was or ever can be entered against him*. To have made Bessette defendant to the bill and to the decree would have defeated the jurisdiction of the Circuit Court because the W. B. Conkey Company and Bessette were both citizens and residents of the State of Illinois, and the jurisdiction of the Circuit Court was based solely on diverse citizenship. But, further, the W. B. Conkey Company should be held to be estopped to raise the objection that the final decree was not brought up by Bessette in his appeal. The record shows that the judgment against Bessette was entered on October 19, 1901 (Record, page 597). Bessette was a poor man and was sent to jail, where he was confined for some time. Not being a party to the record he had no voice, no standing even, to urge the entering of a final decree. If the rule were that one circumstanced as Bessette was must lie in jail —in the absence of a payment of his fine—until the complainant elected to take a final decree, it would place it in the power of such complainants to defeat all remedy by an appellate review to those whose conviction had been obtained. Still further, it appears that

the W. B. Conkey Company has caused the final decree to be incorporated in the record—irregularly, it is true—so that there is no such insufficiency of data as would cause the Court to hesitate lest it act improvidently for want of knowledge of the facts. On the plainest principles of justice Bessette ought to be allowed to appeal from so much of the record as was final as to him. Many respectable Courts have entertained this view of the law. (*Lester vs. People*, 150 Ill. 408.)

It is obvious, of course, that if this proceeding were civil and remedial as against Bessette, the want of diversity of citizenship would defeat the jurisdiction of the Circuit Court and make the judgment void.

It is also obvious that the Circuit Court was unauthorized when apprised of its want of civil jurisdiction to switch the case after the conclusion of the trial and enter a punitive fine as upon the commission of a public offense. This action of the trial Court in changing at the last moment the theory of the proceeding is palpably disclosed by the record, and the error of that action is sought to be corrected in the assignment of errors, made for the consideration of the Circuit Court of Appeals.

SPECIFICATION OF THE TRIAL COURT'S ERRORS.

I shall not, without the express permission of this Court, assume to argue the errors assigned in the Circuit Court of Appeals upon the trial Court's record, but inasmuch as that record may illuminate some of the matters upon which this Court may elect to pass in deciding the questions certified to it, I deem it my duty to give a specification of the trial Court's errors, with a summary of the record pertaining thereto.

The First Specification of Error.

It may better serve the convenience of the Court to assemble those assignments, which present different aspects of a single question, and such a plan will be pursued. In the assignment of errors (Record, pages 119-122) twenty-five rulings of the Court are challenged. There were many exceptions taken by the appellant throughout the proceedings, but those which are not assigned will be used only to illustrate the fatality of those which are assigned. The assignment will be taken up as nearly as possible in its order and as follows:

> 1. The Court erred in overruling the plea of the said Edward E. Bessette to the jurisdiction of said Circuit Court over the person of said Bessette in the matter of said petition.

The plea to the jurisdiction was presented under a special appearance (Record, pages 87-88; *ante* pages 26-27.) The case was presented and tried upon the theory that Mr. Bessette was in contempt for violating the restraining order. The Court in the trial made numerous rulings, illustrative of the theory of the case. Some of the Court's observations are quoted, as follows:

"The complaint is made against a party for a violation of an injunction. The petition or information, or whatever you please to call it, is before the Court because it is a pleading, and the truth or falsity of the matters contained in it is the very matter to be tried. It is not evidence itself any more than any other pleading * * * Now, the Court knows, from its knowledge of the history of these matters, that Mr. Bessette was not a party to the original bill; that he was not named in the writ of injunction, and was not served by the marshal in the writ of injunction.

Now, the basis, the only basis of making Mr. Bessette answerable, is on the ground that he, after having received knowledge of the restraining order, made himself a party thereafter in violating the restraining order in connection with those who were enjoined by it, and it is for the purpose of allowing a basis for the introduction of that sort of proof that I allowed the original writ and return to be read in evidence." (Record, page 150.)

The Second Specification of Error.

The second, third, fourth, fifth and sixth errors assigned present anew the question of the theory and nature of this proceeding; they may be summarized as follows: (a) The pleadings do not charge a crime (b) the proof does not establish a crime; (c) the matters pleaded and proved do not constitute an offense against the administration of justice punishable by fine for the use and benefit of the United States; (d) the crime, if any was committed, was committed in Illinois; (e) the Court for the District of Indiana had no jurisdiction to enter a rule against Edward E. Bessette to show cause why he should not be punished for contempt of Court in violating the restraining order.

The Third Specification of Error.

The seventh error assigned (Record, page 120) is taken as the third specification of the errors relied upon. It is as follows:

> 7. That the Circuit Court of the United States for the District of Indiana erred in not discharging the said Edward E. Bessette upon the incoming and filing of his verified answer to the rule to show cause.

In ruling upon the admission of this verified answer in evidence the Court said: "If it is verified by the defendant it may be used both as an affidavit and an answer." (Record, page 282.) The following is part of a colloquy which occurred at the trial (Record, pages 308, *et seq.*) upon the appellee's motion to strike out from the evidence so much of Mr. Bessette's answer as pertained to the theft of a union label by D. R. Huntington, the complainant's witness, viz.:

> The Court: I have heard the answer read; so far as the answer is material and responsive to the case made here, it will be considered as to the testimony of the defendant, the same as though he had been put on the witness stand, but I am not going to try the Union. It don't matter if the Typographical Union gave him the power of attorney, authorizing him to do the acts that he is charged with doing. That is no excuse. He is here for the purpose of answering just what he has done; nothing more, nothing less; it will be regarded by this Court as of no earthly consequence whether he was authorized or not by the Union to do that very thing.
>
> Mr. Newberger: That was my idea, that his authority or the lack of it would cut no figure.
>
> The Court: The Court is clearly of the opinion that there is no power in this country, from the President of the United States down, that has any authority or power to clothe any man with a shred of right to violate a lawful injunction issued by this Court. Subject to review by other tribunals, the judgment of this Court is supreme in that regard. Neither the executive nor legislative power can interfere with a judicial proceeding.

Mr. Rooker: Your Honor, this matter was put in here, because in our theory of this case, according to our theory of it, we had a right to show that we appeared there in an independent relationship and for a lawful purpose. That we had a right to appear upon the scene and did appear upon the scene in an independent relationship, separate and distinct from any alliance with any of the parties who were charged in this bill.

The Court: Mr. Bessette, the same as any other citizen of the United States or of Canada or any other country in the world, has a right to go there and has a right to be present when the strike was going on, and has the right to do anything in the world that did not violate the injunction, and no authority emanating from any tribunal or any body of people, at home or abroad, could give him any further right. He possessed precisely the same right to go there as a citizen of the United States that he would have if he was sent there by any organized body. The Court does not recognize, does not understand the law to be that any union, Typographical or otherwise, can communicate a single shred of authority to anybody else to go and mix up in a strike beyond the right and authority he has as a free man and a citizen of the United States. He possesses in his own person every right and every prerogative to be there that could be conferred upon him by even the President of the United States. I said this morning that the Labor Commissioners of the State of Indiana have no authority which gives them power to go down there or any place within the State and to violate any lawful injunction that this Court issues. In other words, the power of this Court is independent of any legislation of the State. The power of this Court to enforce its judgments and decrees is independent

of the executive and legislative powers. This Court has an equal and co-ordinate power under the Constitution of the United States with the President and with Congress, and so long as the Court keeps within its constitutional power there is no tribunal that can stay its hands or can revise its acts, except the judicial power of the Nation to be exercised on appeal. I don't see that it is a matter of any earthly concern whether Mr. Bessette went down there as the representative of the Typographical Union. If they had an interest they had a right to send a man down there. If they did not have any interest and some individual had an interest he had a right to go down there. He had the right to persuade and advise and to do anything that was lawful and not in violation of the injunction of the Court, and no human power could give him any right beyond that. The judgments of the courts would be idle, would be a farce, if any body of men could get together and invest any person with authority to disregard them.

Mr. Rooker: It is not under that theory, if your Honor please.

The Court: What theory is it then?

Mr. Rooker: Well, it is on the theory, as I stated, that the man wasn't there simply as an idler; he went there for a legitimate purpose, so long as he stayed within the law and we undertake to advise the Court what that legitimate purpose was.

The Court: Yet, Mr. Rooker, and it is on that theory that I try the case, if he just simply wanted to go down there as an idler and sit on the street corners and smoke cigars, he had as perfect a right to go down there and sit around and talk

and do anything that was not in violation of the restraining order, as though he had been sent there by the highest authority.

Mr. Rooker: We put this in there, because the adjudicated cases seemed to warrant it.

The Court: I am going to allow it to stand, with the exception of the matter with respect to Mr. Huntington, which was objected to by the petitioner. His acts are not on trial here. I have stricken that out and given you an exception. So far as the other is concerned it may stay in, but I have said that I think Mr. Bessette has as perfect a right to go down there and do anything within the law and that was not in violation of the injunction issued by this Court as though he had fifty commissions from as many different labor unions. He had as perfect a right as a citizen of the United States to do that as anyone else. Whether he went there to loaf or whether he went there to work—what his motive may have been is of no consequence if he was there within his own right. Any stranger could go there for that matter. We are not trying that question. We are trying the question whether or not being there he did anything that was unlawful or a violation of the injunction. That's all.

The Fourth Specification of Error.

The eighth, ninth, tenth, eleventh, twelfth and twentieth errors assigned (Record, pages 120-121) may be grouped, for consideration, together, inasmuch as each presents the question of the power and right of the Court to proceed against Mr. Bessette for the violation of a restraining order to which he was neither a party *eo*

nomine nor as one of a class. Of these numbers, the eighth was based on the action of the Court in admitting in evidence the original bill for an injunction; the ninth in admitting the restraining order; the tenth the marshal's return to the restraining order; the eleventh and twelfth the affidavit, and also certain parts thereof, of Henry P. Bogle, and the twentieth so much of the affidavit of Alfred E. Wilcox as tended to state alleged damages sustained by the W. B. Conkey Company, from August 24 to October 2, "by reason of the means employed by the defendants, their confederates, aides and abettors in doing things in direct violation of the restraining order of this Court, entered in the cause above entitled," etc. (Record, pages 281-282.) The proceedings as to the affidavit of Wilcox begin on page 279 of the Record and include the following:

Mr. Newberger: We now offer to read in evidence the affidavit of Alfred Wilcox.

Mr. Rooker: To that affidavit, if the Court please, we make the objection that the restraining order as to Mr. Bessette is void for the want of jurisdiction of the person, and the further objection that the restraining order being void as to him, he cannot be called upon to respond in this case to damages such as stated in this affidavit; and we make the further objection that in this case Mr. Bessette is cited to answer as to violations of the restraining order and as to that alone. We submit, upon these objections, the entire affidavit should go out.

The Court: Of course, the description of who he is, what his business has been, in connection with the Conkey business, is competent enough. There is only one material fact testified to; he gives a basis upon which he is able to testify to the ex-

tent of the injury. The only question is whether or not, from the time the writ was issued down to the second day of October, one hundred dollars per day was the damage and that that would include the loss of business and other injury to their factory. Now, the question is this: Where an injunction is issued to restrain people from interfering with a man's business and property and a party is charged with contempt for violating that order, is it competent or incompetent to introduce evidence in order to enable the Court to fix the measure of punishment, to show how serious the effects of the injury were? That is all that is competent for. To that extent the Court will admit it and you may have an exception. It is admitted, however, for that purpose, and for that alone, as tending to show the extent of the injury that was suffered by the violation of this restraining order. Of course, in a suit under a proper bill, they could go before a master and show the extent of injury, if they desired to do it; if that bill was framed so as to pray relief for damages, and they made it out, they would be entitled to a permanent injunction and a decree against the parties who were made parties to the bill in the nature of a judgment against them. In this case, however, it is only material in the one aspect of throwing light on the duty the Court would have to perform if it finds the defendant guilty, and that is in measuring what ought to be the punishment inflicted. It seems to me that the Court has a right to know, whenever a case is brought before it, the extent of the damage, because if the injury to the party arising from the violation of the injunction is trivial it would not be so serious a matter as a case where the violation of the injunction produced great and serious damage. I will allow the affidavit to

remain simply for the sole purpose of tending to show the extent of the injury from the time Mr. Bessette came down there to the time that the information was filed. That would be the limit.

Mr. Rooker: Would your Honor give us an exception to the part that you admitted on that theory?

The Court: Certainly.

The objections to the introduction of the original bill are stated on pages 129-130, as follows:

Mr. Newberger: I will first offer in evidence the original bill of complaint upon which the restraining order was granted.

Mr. Rooker: As to that, if the Court please, the defendant, Edward E. Bessette, objects for the reason that the bill for injunction is irrelevant and immaterial, for it does not declare that Edward E. Bessette, this defendant, is a citizen and resident of the State of Indiana, or that he was a citizen and resident of the State of Indiana at the time of the filing of the bill; nor does it make any averment showing, as to said Besette, that the cause is within the jurisdiction of this Court; and for the further reason that Bessette is cited to appear in this cause and answer to an alleged violation of the restraining order made in this cause.

The Court: The objection may be overruled, and the defendant Bessette have an exception.

The proceedings as to the introduction of the restraining order appear on pages 144-145, and were:

Mr. Newberger: Now we will offer in evidence the original temporary restraining order granted by the Court in this

case, which, I believe, you admit was granted on August 24, 1901.

Mr. Rooker: Well, really, I don't know, but if you say that is the date, I will not controvert it.

The Court: Have you the original writ returned into court?

Mr. Newberger: I presume the clerk has it. I did not regard it as open to any question.

The Court: I suppose the same objections you want interposed to the admission of the restraining order that was issued?

Mr. Rooker: And adding to the objection made to the bill that for want of jurisdiction over the defendant in this cause the restraining order as to him is void, it appearing on the record that at the time of the filing of the bill the relief sought was against citizens and residents of the State of Indiana.

The Court: The objection may be overruled and the defendant have an exception.

The objections to the marshal's return reiterated those as to the bill. (Record, page 148.)

The Fifth Specification of Error.

The thirteenth assignment of error is a follows:

13. The Court erred at the trial of said cause of this defendant in admitting in evidence, over the objection of said Edward E. Bessette, evidence to prove the acts of other persons without sufficient proof of the identification of said Bessette with the said acts of said other persons.

We shall use this assignment and the twelfth together, as the fifth specification. The errors complained of, the appellant contends, run throughout the record. The first exception to which this Court's attention will be called is assigned as the twelfth error, *supra*, and was taken upon the offer to introduce the affidavit of Henry P. Bogle. (Record, pages 150-161.) One of the questions of law presented by this exception is addressed *to the right of the Court to convict Mr. Bessette of conspiracy under the issues here tendered.* The following appears in the record, beginning on page 150:

> Mr. Newberger: I will now offer to read in evidence the affidavit of Henry P. Bogle.
>
> Mr. Rooker: Now, if your Honor, please, there are a number of these affidavits. Of course, I haven't the least information concerning what is contained in them. I do not want to "sin away my day of grace," and let matter go in as to which if I was informed I would object, and I do not know how I would get my objection accurately without having the opportunity to know what is contained in the affidavit.
>
> The Court: It may be passed to counsel and counsel may look at it. There is one thing, however, that is entirely within the control of the Court, and that is the matter of marshaling the order of proof; that is a matter entirely within the discretion of the Court. Now, the Court knows from its knowledge of history of these matters, that Mr. Bessette was not a party to the original bill; that he was not named in the writ of injunction, and was not served by the marshal in the writ of injunction. Now the basis, the only basis of making Mr. Bessette answerable is on the ground that he, after having received knowledge of the restraining order, made himself a

party thereafter in violating the restraining order in connection with those who were by it enjoined, and it is for the purpose of allowing a basis for the introduction of that sort of proof that I allowed the original writ and return to be read in evidence. Now, the logical order of making proof would be to show that this defendant was advised of the tenor of the restraining order; that he knew of it; and then next show that he violated it in connection with parties who were restrained in some one of the particulars set forth in the information. That is the natural order. Of course, the Court would permit, on the assurance of counsel that they would make that proof, the proof of what he did to go in first. It won't do any harm, as it is a matter on trial before the Court, which way it is done, but if it was a trial before a jury I should insist upon having the logical and legal order of introduction of evidence observed, and if it is just as convenient it will be observed here.

Mr. Newberger: It may be inconvenient, and I think the evidence that we will present to the Court will cover the question fully. There is hardly a denial by Mr. Bessette in his sworn answer of knowledge of this restraining order.

* * *

The Court: Well, counsel say that it will be inconvenient for them to pursue the logical order of proof, and as the hearing is before the Court there is no danger of the Court being misled as a jury might be, and we will not observe the logical order of proof. Of course, the cause fails unless that vital point is proven. It is not necessary that he should have read and analyzed at all the paper. Of course, if a man is advised

generally that there is an injunction that generally prohibits the doing of certain things, and with notice and knowledge he shuts his eyes and goes ahead, he is chargeable with all that he might have learned and ought to have learned, and would not be excused.

Mr. Rooker: Now, as to that statement, if the Court please, for the purpose of saving the law question, I desire to take an exception to so much of the statement as pertains to the admissibility of evidence upon the theory that Edward E. Bessette is charged in this case with a contemptuous obstruction of the administration of justice and a contemptuous obstruction of the processes of the Court, and also to make our objection at this time to the statement of the Court that the Court will exercise its discretion to allow proof of the acts of Bessette prior to a showing that he had lawful information as to the restraining order.

And we will also object to the statement of the Court to the effect that it will exercise its discretion so as to allow proof of any specific fact prior to the proof of the averment of confederacy or conspiracy unless the act offered to be proven is one committed by or in the presence of Bessette.

The Court: Well, the Court has not indicated that it would allow any statement of any other person to be used in evidence against Mr. Bessette unless in his presence, until there was some evidence offered of a conspiracy and confederacy to do some act in violation of the restraining order. The Court, therefore, overrules your motion and desires to say that the Court regards it as a matter within its discretion to determine the introduction of the evidence in such order as to the Court may seem conducive to a speedy hearing of the cause,

but I desire to repeat again that the Court does not mean to be understood as intimating that the acts and declarations of other parties who are restrained would be admissible in evidence against Mr. Bessette until some proof satisfactory to the Court is made showing *prima facie* that he was acting in combination with others who are restrained in this cause.

Mr. Rooker: If the Court please, with respect to the affidavit of Henry P. Bogle, the defendant, Edward E. Bessette, objects, for the reasons stated in our objection to the introduction in evidence of the petition for attachment and the order based thereon. I take it that your Honor would overrule that generally.

The Court: It may be overruled.

Mr. Rooker: And note our exception. The defendant, Edward E. Bessette, objects to each of the following specific parts of this affidavit:

First: So much thereof as reads as follows:

"On or about August 16th, 1901, Harry Alting, one of the pressmen in the employ of said W. B. Conkey Company, was discharged for incompetency in his work."

We objeect to that for the reason that it states a conclusion and for the reason that it does not show any knowledge on the part of this affiant, Henry P. Bogle, upon which such conclusion is predicated, and for the further reason that it is incompetent, irrelevant and immaterial in this cause, because not being called now for trial upon the merits or demerits of this alleged cause of action.

We make, also, the same objection to the following averment in the affidavit of Henry P. Bogle: "On or about Monday, the 19th of August, 1901, about thirty-nine feeders and

pressmen left the employ of said W. B. Conkey Company. Immediately afterwards, the presses were shut down. During the week beginning August 20th and ending August 25th, 1901, and during the week following, over one hundred persons went out on strike in addition to the thirty-nine above mentioned; men, women and girls joined the strikers. On August 20th, 21st, 22nd, 23rd and 24th, 1901, a number of new men were employed through the Chicago office of the company, to fill the places of the strikers."

Now, we object to that for the same reasons as stated in our previous objection to a specific part of this affidavit, and for the further reason that the facts alleged to be recited here are on their face prior to the issuance of the restraining order; and we object specifically to the clause and sentence "On October 20th, 21st, 22nd, 23rd and 24th, 1901, a number of new men were employed, through the Chicago office, to fill the places of the strikers." We object to this for the reasons previously stated, and for the further reason that it states a conclusion and does not attempt to state any fact within the knowledge of his affiant.

We object also for the reasons stated in our first objection to a specific part of this affidavit, to the following: "I met the trains coming from Chicago at different times for the purpose of escorting these new men to the Conkey plant. In almost each instance, as these new men alighted from the trains, they were surrounded by a large number of strikers, aggregating in number from fifteen up to fifty. The strikers would immediately take hold of the new men and by means of threats, intimidations, the use of vile, indecent language, and, in some cases, actual violence, the strikers succeeded in forcing the

new men not to come with me to the plant of the W. B. Conkey Company. In a number of cases the strikers would drag the new men away with them. I did not succeed in bringing to the plant to exceed 10 per cent. of the number of men who came to Hammond for the purpose of entering the employ of the W. B. Conkey Company."

We add to our objection to this clause the further objection that *this matter appears to be reciting wrongs committed by persons not in the presence or under the authorization or instance, either directly or indirectly, of Edward E. Bessette, and for the further reason that it recites a conclusion without stating information upon which the conclusion is predicated.*

We make the same objection stated in our first objection to a specific part of this affidavit to the following, set forth in this affidavit: "Upon August 24th, the injunction was issued in the above entitled cause. During the hours of 6 o'clock in the evening of August 24th, 1901, and 1 o'clock the next morning, there were about 500 copies of the writ of injunction posted in conspicuous and prominent places in and throughout the city of Hammond and in and about the plant of the W. B. Conkey Company."

And, also, we object to this clause: "On August 25th and 26th, 1901, the principal features of the writ appeared in the following newspapers, published in the city of Chicago: 'Chicago Tribune, 'Chicago Daily News,' 'Chicago Inter Ocean,' 'Chicago Record-Herald,' 'Chicago Evening News,' 'Chicago Evening Journal,' 'Chicago American' and 'Chicago Evening Post,' all of which papers have a large circulation in the city of Hammond. On August 26th, 1901, it appeared in the newspapers published at Hammond, Ind., namely, 'Hammond Tribune' and the 'Hammond Daily News.'"

And we add to this objection the further objection that it is improper for the witness to assume to state, and to state, what the principal features of the writ of injunction were, and for the further reason that the writ of injunction was void as to Edward E. Bessette, for the reasons stated in our objection to the introduction in evidence of the restraining order, and we add, also, the further objection that in this cause Edward E. Bessette is cited, not to answer as to a contemptuous obstruction of the administration of justice, but he is cited to appear to show cause why he should not be punished for violating a restraining order heretofore issued by this Court in this cause.

We also make the last named objection to the following parts of this affidavit: "During the week beginning August 25th, 1901, and ending August 31st, 1901, I went to the various railroad stations at Hammond for the purpose of meeting men who had been employed through the Chicago office, and notwithstanding the writ of injunction had been issued, served and liberally published through Hammond, the men whom I met were accosted by the strikers and were persuaded not to enter in the employ of the W. B. Conkey Company."

We add to that objection the further objection that the element of persuasion is not prohibited by the restraining order made by the Court in this cause.

We also make the same objection to the following: "Ever since the writ of injunction was issued there have been, from time to time, gatherings of strikers and sympathizers on the corner right in front of the plant of the W. B. Conkey Company, these men parading up and down Conkey avenue between the Monon tracks and the building of said W. B. Conkey Company and passing over the land owned by the W. B. Conkey Company."

We add to this the further specific objection that *these acts complained of do not appear to have been committed at the instance or upon the procurement of Edward E. Bessette, nor at the instance or upon the procurement of any person confederated with him, and that it appears upon the face of this averment that the acts complained of were committed by a class of persons to whom the defendant, Edward E. Bessette, does not, and did not at the time, belong.*

We make the same objection that was made to the last preceding item of this affidavit to this clause in this affidavit: "These strikers used epithets, threats and attempted in various ways to intimidate the employes of the W. B. Conkey Company."

We add to that the further specific objection that the affiant states a conclusion as to what were epithets and threats, without stating what the epithets and threats were, and that it is indefinite and uncertain and states conclusions in so far as it recites that they attempted in various ways, not mentioned, to intimidate the employes of the W. B. Conkey Company.

We make, also, the objection that was made to the first item of this affidavit to the following: "There has been daily, ever since the writ of injunction was issued, and there now is, a well organized corps of pickets parading up and down the streets, highways and paths leading to and from the plant of the W. B. Conkey Company."

We add to that the further specific objection that it states a conclusion and that the defendant in this case is entitled to know the nature of the organization of the corps of pickets and the objects and purposes of the pickets, with a view of determining whether or not their alleged acts were acts which

would constitute a violation of the restraining order made in this case.

We make the same objection made in the first item of this affidavit to the following: "Almost daily since the strike I have received reports from some of the employes that attacks had been made upon them, and that in some cases bodily injury inflicted by some of the strikers or by some one acting in concert with them."

We add to that the further objection that this matter assumes to state matter that is hearsay as to his receiving reports. This defendant, Bessette, is entitled to know the nature of the communication and to know the authority and right of the person making these communications, to the end that this Court may determine whether this defendant, Bessette, is to any extent whatsoever responsible for those reports and communications, and in order that this Court may determine whether those reports and communications were of a character in derogation of the restraining order made in this case.

We make to the following the same objections that were made to the last preceding clause in this affidavit, the matter now objected to being as follows: "In a number of cases, young girls who were employed in the bindery of said plant, whose ages average from fourteen to twenty years, are detained on their way to and from said plant, and the men who do this invariably insult them, and, in a large number of cases, the strikers have threatened to slap the girls' faces and otherwise injure them if they refuse to join the strikers, and in some instances girls who are willing and anxious to remain in the employ of the W. B. Conkey Company have been compelled to leave for fear these threats would be carried out."

We add that this states a conclusion without stating the facts upon which certain persons are reputed to have quit the service of the W. B. Conkey Company. *We say that this matter is hearsay;* that this witness has no right to state a conclusion either as to the effect upon the minds of the employes of the alleged treatment that they received; nor has he a right as a conclusion to characterize that treatment; *nor has he a right to bind this defendant by a statement not made in his presence or by his authorization as to why the particular employes abandoned the service of the W. B. Conkey Company.*

We make the same objections which were made to the last preceding clause of this affidavit to the following: "The pickets above referred to stand around in groups of from four to twenty in number, all around the factory, and are constantly taunting the employes, and, when not making threats, attempt to terrify them by their appearance and their general bearing, and a number of the employes of the Conkey Company are in constant fear of their lives and it is with great difficulty that they are persuaded to stay in the factory. A large number of the employes of the W. B. Conkey Company are compelled to go with policemen to protect them from bodily injury."

We also make the same objection made to the last preceding clause in this affidavit to the following sentences in this affidavit: "I have at different times gone to the factory at night in order to have the police meet some of the employes in the mornings at their home and boarding houses to bring them out to work. Among the persons I have thus protected are the following: J. B. Horton, E. Minger, Abraham Greenbaum, P. Humphreys and D. G. Sheehan."

We add to this objection to this specific item the further objection that the objects and purposes of this affiant in going to the factory of the W. B. Conkey Company at night is entirely irrelevant and immaterial to any issue that the Court is called upon to determine in this cause.

We make to the following clause in this affidavit the same objections that were made to the first clause in this affidavit, the present clause being, namely: "I have repeatedly heard it stated that the strikers have employed thugs from Chicago to assault the employes of the W. B. Conkey Company and that these thugs are now in and about said city of Hammond."

We add to that objection the further objection that it is hearsay; that it does not assume to have been spoken either in the presence or by the procurement either directly or indirectly of Edward E. Bessette or by any person confederating with him; that on its face it may be a statement made by the W. B. Conkey Company for no other purpose than to qualify this affiant to reproduce this statement before this Court at this time.

We make the same objections which were made to the first clause of this affidavit to the following: "In one instance, one J. W. Henning assaulted one of the employes of the W. B. Conkey Company by the name of E. Minger, on Friday, August 30, 1901, and administered severe injury on said Minger by hitting him about the eye, nose and head. The next day Henning assaulted one Horton and struck Horton in and about the head."

We add to that objection the following specific objection, that this matter does not appear to have been done either directly or indirectly by the defendant, Edward E. Bessette.

We make to the following clause in this affidavit the same objection that we made to the last preceding clause, namely: "Said Henning claims and pretends that he lives in Chicago, Illinois, and is a stone cutter by trade, and that he is acting in the interest of the Conkey strikers. Said Henning was arrested, and, immediately after his arrest, one Harry Morrison, one of the strikers who is prominent in the matter of picketing and other maneuvers of the strikers, made repeated efforts to secure bail for said Henning and protect his interest while he was under arrest."

We add to this objection the following specific objection, namely: that the claims of Henning set out in the affidavit are hearsay and not binding upon this defendant; as to so much of the clause as pertains to reciting the efforts of strikers to procure bail for Henning the matter is not shown to either be unlawful in itself—the matter of procuring bail for a prisoner —nor is it shown to have been done, either directly or indirectly, at the instance or procurement of the defendant, Edward E. Bessette.

We make the same objection which we made to the first clause of this affidavit to the following clause in this affidavit:

"Among those who have been most prominent in accosting the men in going to and from the Conkey plant, and doing picket work, and in meeting the men at railroad stations, and making threats, are John Dunlavey, William Rutz, John Ackerman, Gus Collins, E. W. Tatum and Harry Alting."

We add to that general objection the specific objection that it is not averred or shown, nor is any fact stated upon which the Court can infer that the acts of Dunlavey, Rutz, Ackerman, Collins, Tatum and Alting were, either directly or indi-

rectly procured to be done by the defendant, Edward E. Bessette or with his knowledge or consent; and for the further reason that it is not per se unlawful to go to the railroad station and meet persons. We do not confine this latter clause of the objection to the allegation that on these visits they made threats, but as to the allegation they made threats, we object, it is the statement of a conclusion.

I ask your Honor's pardon for having consumed so much time. I might have abbreviated these objections if I had had the affidavits previously.

The Court: The objections of the defendant may be overruled and the defendant have an exception.

The affidavit of Bogle, to whom these objections were addressed, was then read in evidence. (Record, pages 158-161.)

The Sixth Specification of Error.

The fourteenth error assigned will constitute the sixth specification of error. The assignment is as follows:

> 14. The said Circuit Court erred at the said trial of the cause of this defendant in admitting in evidence over the objection of said Edward E. Bessette the affidavit of Michael J. Kennedy.

Some of the errors complained of in previous specifications reappear in the objections to the affidavit of Michael J. Kennedy. This assignment is not intended specifically to present those errors anew, but they are not waived. Aside from those errors, these rulings show that the Court enlarged the restraining order upon the trial so as to (1) include acts of persuasion; (2) peaceable picketing at the railroad station, some two miles distant, and (3) acts

which occurred prior to the issuance of the restraining order, and which could be contested only upon a trial of the original suit or upon a motion to dissolve made by a party to the suit. The record, beginning on page 161, discloses the following:

> Mr. Newberger: Next we offer to read in evidence the affidavit of Michael J. Kennedy.
>
> Mr. Rooker: If the Court please, the defendant, Edward E. Bessette, makes each of the following objections to each of the following specific parts of the affidavit of Michael J. Kennedy, now offered in evidence by the complainant:
>
> The first objection is to the following clause: "At the time the strike occurred at the plant of the W. B. Conkey Company, August 19, 1901, I was ordered to patrol the sidewalks and entrances to said plant, and ever since said last mentioned date have been attending to such duties. My hours are from 6 o'clock in the morning until 6:20 in the evening. During the early part of said strike a large number of exemployes of said W. B. Conkey Company, hereinafter referred to as strikers, would surround people as they reached said plant, and, by means of threats, tried to induce, and in a number of instances succeeded in inducing, them not to enter said plant. It became necessary in almost each instance for me to go to the street car and take the persons wishing to enter the factory of said W. B. Conkey Company in charge in order to protect them from assault and violence."
>
> *We add to that objection that the facts recited appear to be facts preceding, and not following, the issuance of the writ of injunction, and, therefore, are irrelevant and immaterial, the defendant Bessette in this case being called to answer, not as*

to the merits of the original controversy, but as to the violation of the restraining order of the Court made in this case.

We make the further objection to the following clause in the affidavit of Michael J. Kennedy: "On the 25th day of August, 1901, the writ of injunction issued by the Honorable John H. Baker was served on all strikers and all persons at and near said plant; in addition to the service, a copy of said writ was posted in a number of conspicuous places in and about said plant, and was distributed among the strikers of said W. B. Conkey Company."

We object to that as irrelevant and immatrial, for the reasons stated in our objection to the introduction in evidence of the restraining order, and for the further reason that it is not shown that Bessette was a member of any of the classes of persons who are charged with having been served with the restraining order, or with having information as to the restraining order, and for the further reason that in this case Bessette is not cited to answer as to a contemptuous resistance or obstruction of the process of the Court in the administration of justice, but that he is charged simply with violating the restraining order made in this cause.

We make also objection to the following clause in the affidavit of Michael J. Kennedy: "Among said persons who have been doing picket work are the following: F. Robinson, John Dunlavey, Louis Wildermuth, Robert Whitehead, Thos. O'Neil, Ed. Wells, Gus Collins, Louis Whitton, William Rutz, E. A. Wright, J. W. Sugrue, Charles Johnson, C. Hipp, James Bowman, Ed. Bessette, Oscar Holke, H. French, A. Hoek, E. Wheed, alias Snitzer, John Hoberg, Floyd Foker, Pat Grosse, John Rice, Frank Valla, Harry Morrison and John Ackermann."

To this we make the objection that the limitations stated in this clause as to the picketing complained of put the acts complained of prior to the issuance of the restraining order and go to the merits of the original action, and not to the alleged infraction of the restraining order after it was made and entered.

We also object to the following in this affidavit, and for the same reasons stated in our objection to the last preceding clause: "Said pickets form in squads of three or more; some of them use bicycles and ride up and down Conkey avenue, which is a public highway leading to the plant of the W. B. Conkey Company, and is used by over 60 per cent. of the employes of and persons having any business with the W. B. Conkey Company. Said pickets accost all persons going to and from said plant, and if the same are employed there, attempt to induce said persons not to remain in the employ of said W. B. Conkey Company or enter into its employ, or have any business dealings or connections with said W. B. Conkey Company."

We make to this clause the objections made to the last preceding clause and add thereto that the facts as recited do not appear to be a violation of the restraining order, though the Court might infer that these acts were subsequent, and not prior, to the issuance of the restraining order, it not being charged that any unlawful influence was brought to bear upon persons to induce them to quit the service of the Conkey Company, and it not being shown that the alleged picketing was for the purpose of exercising any unlawful influence upon any person in the service of the W. B. Conkey Company.

We object also to the following clause in this affidavit: "The said persons on said picket duty openly state and represent that they are there for the purpose of doing picket duty and for no other purpose."

As to Bessette, we object to this, for the reason that the statements do not appear on their face to have been made by Bessette alone, or by others in his presence or hearing, or by his procurement, or by any person with whom he was confederating.

We also object to the following clause in this affidavit: "Said pickets also patrol a short street passageway leading up to the front entrance of said W. B. Conkey's plant, and also the streets and paths leading from said plant to the Erie and Monon Railway tracks. This last said pathway is used by possibly thirty per cent. of said W. B. Conkey Company's employes."

We make to that the same objection we made to the last preceding clause and the further objection that there isn't anything brought to the knowledge of the Court as to the relative location of the Monon Railway tracks, the Erie Railroad tracks and the W. B. Conkey Company, nor anything to show an authorization in the Court to keep persons from using the Monon tracks and the Erie tracks; nor is there anything showing that the use of the Monon tracks and the Erie tracks by the persons complained of was for any reason whatsoever unlawful; nor is there any showing that the defendant Bessette was a participant, either directly or indirectly, in any of these acts complained of.

We also object to the following clause in this affidavit: "On a number of occasions I have reminded said pickets of the terms of the injunction, and they have invariably replied that they had read the injunction before, but that they did not propose to obey it."

To that we add the specific objection that the charge against Bessette in this case is not a contemptuous obstruction of public justice, or the resistance of the processes of this Court, but that he is charged with violating this restraining order.

We add the further objection that the declarations are hearsay, and that we are entitled to have made known the connection between Bessette and the persons complained of, and thereafter, if such showing were made, that we are entitled to have the conversations of the parties, and not the conclusion of this witness as to the force and effect of these conversations.

We also object to the following clause in this affidavit: "On Friday, the 6th of September, 1901, Oscar Holke, H. French and Floyd Foker congregated on the lawn immediately across the street from the W. B. Conkey Company's place of business within one hundred feet of said plant, and I approached them and asked them what they were doing. Said Oscar Holke replied, 'I am doing picket work here.' Said Foker and French were present at the time I asked said Holke and heard my question and said Holke's reply. Said persons, after their statement to me, remained there for at least two hours, and when they left three or four persons took their place. I have had similar experiences almost daily and with persons who were doing picket work, and said persons do not make any secret of the fact that they are there for picket duty and propose to do so. Among those who have been more active in such picket work are the following: John Dunlavey, John Ackermann, and William Rutz, Oscar Holke and E. Wheed, alias Snitzer."

We object to this for the reason that these persons do not assume to have been acting for Bessette, nor is there any showing that Bessette was present, or procured their presence, either directly or indirectly, or that the information ever came to the knowledge of said Bessette in such manner as that he

could deny or repudiate the statement of Holke and others as to their purpose in being present at the place mentioned.

The Court: The objections to the affidavit may be overruled and the affidavit may be read, and the defendant is given an exception.

The affidavit appears in the record at pages 165-167.

The Seventh Specification of Error.

The seventh specification of error embraces the fifteenth, sixteenth, seventeenth, eighteenth and nineteenth errors assigned, which relate respectively to the admission in evidence of the affidavits of Jake Engle (Record, pages 241-247), Maximillian Kieser (Record, pages 248-254), Charles Minger (Record, pages 264-265), Daniel J. Sheehan (Record, pages 265-266) and John B. Horton (Record, pages 270-273). These affidavits and this specification exemplify the error of the Court in trying the defendant upon a charge of conspiracy to obstruct the due administration of justice, when the order and citation were to answer for the violation of a restraining order. This error of the Court was a transgression upon the rights of the defendant under the Constitution and the law of the land. As to the Engle affidavit, the record discloses the following:

Mr. Newberger: I will offer to read in evidence the affidavit of Jake Engle.

Mr. Rooker: Now, your Honor, I want to object to this affidavit; first, because it carries an imputation expressed that this affiant might be able to identify if he could see some of the persons who committed these outrageous assaults upon him. He says he knows some of them and he could identify the others. Now, we object to the introduction of this affi-

davit in evidence for the reason that it presents strikingly a case in which the accused ought to be brought face to face with his accuser, and we submit that under the Constitution of the United States, where a crime is sought to be charged against a defendant, carrying as this does upon its face the imputation that the sight of the accused by the assaulted party is essential to determine whether or not the accused is a party to the transaction, that the accused ought to be brought face to face with the accuser, and the accused have the right of examination; and without such right it is a denial to Mr. Bessette in this case of his protection under the law of the land, and to deny him that right would be conducive to denying him due process of law for the protection of his liberty and property.

Now, I implore your Honor to bear in mind the closing sentences of this affidavit, the horrors of it we all concede: "The persons who were present in the crowd and were taking part in the riot, as I now recall them, were: John Dunlavey, Harry Alting, Jack Sugrue, —— Hoek, Wm. Rutz, —— Eldredge, —— Gross, and Wright, whose Christian name I do not know, and at least ten or a dozen more whose names I cannot give but I believe I could identify them if I could see their faces." Now, I submit, your Honor, that without a showing as to why this very important witness making this character of accusation is not in court or could not be produced in court as against the accused, that this deposition should not be read.

I want to make specific objections to other parts of it if your Honor thinks that the deposition is not tainted with this vicious element I have indicated.

The Court: It was expressly agreed between counsel for the complainant and for the defendant, the defendant being present, that the testimony on the hearing of the charge of violating the injunction might be by affidavits or testimony orally taken in open court, or by both, at the election of the parties. It is a most singular thing, to my mind, that strikers and attorneys for strikers so persistently misunderstand and misapprehend what is meant by a proceeding to punish for contempt. I cannot believe that the attorneys who represent the strikers do misunderstand it. I think myself that one of the dangerous things in contempt proceedings is the fact that ignorant people, unfamiliar with the jurisprudence of England and this country, *do not advise these men* [are not advised] that a proceeding for the punishment of a party for the violating of an injunction is not a proceeding to punish them for the crime that they have committed against the law of the land. That, the criminal courts attend to, and the criminal law of the land, after indictment or arraignment on information and a trial by jury, punishes the crime. Courts of equity do not profess to try men by those methods. If a crime is shown, it is merely an incident; it is not the matter of crime that the court is concerned with at all, the simple issue that the court has to try is whether the injunction was issued, and lawfully issued, prohibiting the doing of certain things, and whether that has been violated; that is all. It may be violated by acts that are criminal in their nature or it may be violated by acts that are not criminal. The Court is not trying them for those acts and it is not proposing to punish the man for any criminal act that has been committed. As it has been said by the Supreme Court of the United States and other courts a thousand times,

the writ of injunction is not issued to prevent the commission of crime. That is not the purpose of it at all. It has nothing to do with restraining men from committing crime. The sole purpose is to protect men in their property rights. And it would be a monstrosity if the courts had not that power. If one of these strikers had rented a house and paid the rent of it for a year, and his landlord came before the expiration of the lease and told him to get out, that he couldn't stay, and did it without any shadow of legal right, but ordered him to get out, and would say to him, "If you don't get out to-morrow morning, I will come with a thousand men and I will push you and your wife and your children and your property into the highway," I reckon that that striker would think that this country was hardly a country fit to live in if he could not appeal to the courts to stop the landlord from violating his property rights by enjoining the landlord and his agents and abettors from pushing him into the street. Or, suppose that a lawyer for one of the strikers had rented an office and paid the rent for it. He had an office that he was satisfied with and where his clients knew where he was, and that it would injure his business and property—his pecuniary interests—if he was turned out of it, and the landlord, because he wouldn't join some lodge, would say to him, "You have got to get out, and if you are not out within twenty-four hours I will come up here with a body of men and I will throw you out." You might say to him that that is lawless; "you will injure my property; you will injure my business," and it is answered, "I don't care; I am bound to do it." I reckon that that lawyer would feel that the justice of this country was contemptible if he could not appeal to the courts and get the courts to lay their hands on

the man who was proposing to do that, and is it anything less where a man has a lawful business and is carrying it on in a lawful way? Is it any less an injury because fifty or one hundred or a thousand strikers come and destroy his business and prevent honest men, who are contented to work, by violence, by terrorism, from exercising that inalienable right which is essential to the preservation of human life and the preservation of a man's wife and children—the right to work? Now, it is for the protection of those things that injunctions are issued, and as this Court has said in opinions on file and printed in the books, and as has been said by every other court that administers justice in countries where the English-speaking people live, from England to Australia, and from Australia to India, wherever the British flag or the American flag floats in time of peace, courts from time immemorial have asserted the right of protecting property from violent and lawless invasion, not for the purpose of restraining the commission of crime—they have no thought of that—but it is to protect men in their property rights. That is the purpose of it, the sole purpose of it; and if a man invades my property rights by the commission of crime—that is, if he would kill—if somebody would kill me—the common law, the civil law, would give the administrator of my estate for my wife and children a right of action, not because the man had committed murder, not for the punishment of the crime, but for the protection and conservation of property rights that they were entitled to. So that it is a total misconception, and a fatal one, to think that a prosecution for the violation of an injunction is a prosecution for a crime committed in the violation of it. It is a misconception that breeds infinite lawlessness in con-

sequence of the ignorance of people and fostered and fed by men who are enemies of social order and of the preservation of the dearest rights of human beings, because there is no other right that is more sacred or more essential to men than the right to work without being disturbed, without being terrorized, without being interfered with, so long as they are occupied in some lawful avocation, and, really, it is treason against the dearest rights of humanity for any man to be concerned in preventing another from earning the money to feed his wife and his babes. I cannot conceive of the moral obliquity of that man who could feel that it is right, by force, or violence, or intimidation, to prevent another man from honestly working to keep his wife and babes from starvation. Your objection is overruled, and you may have an exception.

Mr. Rooker: We want to object to specific parts of it. We object to the following portion of this affidavit for the reasons stated in our first objection to the affidavit of Mr. Bogel yesterday, the part being as follows: "On the first morning that I came to the W. B. Conkey Company's plant I was met by Harry Alting near the W. B. Conkey Company's plant, and he said to me: 'You had better not go to work for the Conkey Company. You had better get out of town, and if you don't I will get two fellows after you that will slug you and get you out of the way, and only for me you would have gotten it before, but now you had better get out of town and stay away; if you don't I will see that you are put out of the way.'"

And we add the specific objection that this is hearsay; that the defendant in this case has not been cited to answer here for an obstruction of the processes of the Court, or an obstruction to public justice, *and that there has not been, and can not*

be, under the issues of this case, a charge of confederacy against this defendant, and there has not been, and can not be, a charge of conspiracy maintained against him under the issues here.

The Court: The objection may be overruled and you may have an exception.

Mr. Rooker: We make the same objections as are stated to the last preceding clause to the following clause in this affidavit: "From that time up until the evening of the 10th day of September no one seemed to pay much attention to me, but while going north on Calumet avenue on the evening of September 10th, in company with Maximillian Kieser, we first noticed four men walking abreast on the street a short distance in front of us, and we were walking a little faster than they were and overtook them. As soon as we got up to where they were they turned about and began to assault us, striking at us, and a man by the name of Dunlavey had a club, and he was raising it as if intending and attempting to strike us with the club. We passed by the first four a short distance, and then there arose from the weeds, grass and bushes, it seemed, about a dozen or more men. Some of their faces I know and some of their names I know, but I do not know the names of all of them. However, I do know that they composed what is called the 'wrecking crew' from Chicago, Illinois. Mr. Kieser was severely beaten with rocks and cut in different places upon his body. I was not struck because I stated to them that if they attempted any violence upon me, that I would 'certainly shoot them, as I was prepared to do so.' At that they left me and directed all of their assault upon Mr. Kieser. The persons who were present in the crowd and were taking part in

the riot, as I now recall them, were: John Dunlavey, Harry Alting, Jack Sugrue, —— Hoek, Wm. Rutz, —— Eldridge, —— Gross and Wright, whose Christian name I do not know, and at least ten or a dozen more whose names I do not know, but I believe I could identify them if I could see their faces. They also created a great deal of disturbance and were very boisterous, and different ones called out: 'Don't let him go,' referring to me, and stated, referring to Mr. Kieser, 'Knock his damn head off,' 'Kill the son of a bitch,' and expressions of such character. All of the statements which were made at that time, and the language which was used by the persons committing the riot I cannot give at this time, but the expressions which I have given above are the substance of the language used, and all of their statements were of like character. They were determined to do us extreme violence, and if it had not been for us calling for help and calling so loud that persons 200 or more feet away heard us, it is difficult to say whether either one of us had escaped from them alive."

The Court: The objection will be overruled and you may have an exception.

The affidavit of Jake Engle was thereupon read in evidence. (Record, pages 246-247.)

As to the affidavit of Maximillian Kieser, the record shows the following exceptions:

Mr. Newberger: We will offer to read in evidence the affidavit of Maximillian Kieser.

Mr. Rooker: As to that we make the same objection that we made generally and in its entirety to the last affidavit, and I want to add—

The Court: You mean the affidavit next before the last. The last affidavit I suppressed.

Mr. Rooker: Yes, your Honor, I stand corrected. If it will not be taken that we consent to the introduction in evidence of these affidavits I shall not renew the objection specifically as to each. If the record may be made to show that all of them are introduced over our objection, as stated in regard to the Bogel deposition, why I will not renew it. I do not care to extend the record.

The Court: The Court will not allow an exception to the submission of evidence by affidavit, for the reason that it was agreed on the 3rd of October, by counsel for defendant, in the presence of the Court and in the presence of the defendant and in the presence of the complaining party, that the evidence might be introduced by affidavit or oral evidence, or by both, at the option of either party, and for that reason the Court will not allow counsel to have any exception to the admission of evidence simply because it is contained in an affidavit. In other words, when a case is brought on for trial the Court will not allow counsel to repudiate an agreement solemnly made in open court in the presence of the defendant.

Mr. Rooker: Will your Honor allow us an exception as to the rest of it?

The Court: Oh, yes, any other objection; I have been allowing any objection that goes to the whole or any part of the deposition on any other ground than that.

Mr. Newberger: I want to say this: That we will take our chances, with the permission of the Court, as to the propriety of introducing any deposition as a whole, so that any objection

as to the materiality of the deposition as a whole may be regarded as made; but objections to parts of the deposition we would not consent to, an objection of that character being considered made; we would want the objections made specifically and ruled on as the depositions are read.

Mr. Rooker: Then may the record be made to show that the general objection goes to all and if a specific objection is desired it may be made later.

The Court: No, as each affidavit is offered counsel may note his objections to the whole or to any part of the testimony on the ground of irrelevancy or immateriality, or any other ground except the ground that the testimony is embodied in an affidavit. The Court will not allow an exception to that for the reason that on the 3rd of October, in open court, it was agreed, as I have stated, that the trial might be had upon affidavits or oral testimony, or both, at the option of either party. That objection the Court will not allow to be taken, because to do it would be in violation of a solemn agreement made in open court, and I will not allow it to be withdrawn.

Mr. Rooker: Will your Honor allow the record to show that we offered [asked leave] to withdraw it?

The Court: The Court will allow you to show that on Saturday preceding the Wednesday when such a request came up such request was made and that the Court rejected it.

Mr. Rooker: We have taken the opinion of the Court upon these law questions that we think material in this case, and I do not like to be put in the attitude of combating what the Court has settled to be the law of the case.

The Court: If you think that there is any further question

that you might inject into the record that you think might be of material assistance to your client, it is your duty to do it.

Mr. Rooker: That is why I ask that the general objection may be shown to be introduced as to each affidavit.

The Court: Ordinarily when a man has one exception it is as good as a thousand, provided they all cover the same thing.

Mr. Rooker: With that understanding I shall not renew the objection each time.

The Court: If any of the views which you have entertained are sound, the Court has announced his views, and you have it in the record; and I do not believe you can raise any other question except the one which I said the Court would not permit you to raise for the reason that it would be in violation of the agreement you made in open court. But still, as each affidavit is offered you may state any objection you please to the whole of it or to any part of it. It may be that there are parts of it that the Court would strike out. Already the Court has stricken out a part of one affidavit, and the Court has suppressed the whole of an affidavit on its own motion, and I shall do so in the future if I see anything that occurs to me to be in conflict with the views that I have stated; I shall strike out the evidence. *I have stated that this prosecution is against Mr. Bessette and these other men, which charges a combination or conspiracy to do acts that are forbidden by the restraining order, and I have stated my view of the information, and then I applied an ordinary rule that obtains even in the trial of murder cases, that where a conspiracy is shown to do a criminal act or an unlawful act, or an act forbidden by a restraining order, all who participated in it, aided, advised, con-*

sented or directed are equally guilty with those whose hands did the act. So I understand the law to be. If I, as the leader of a strike, directed the strikers to do picket work or intimidate men from going to their work, that is in violation of the injunction, although I might be a thousand miles away from it, I would be just as guilty as the man who actually does the act of violence. I may be wrong, but that is the way I understand the law. If I would tell a thousand men to go down and knock somebody's head off, I might sit in my chambers or in the courtroom here, yet if they went and did it I would be just as guilty; even in a criminal trial, I could be indicted and prosecuted, convicted and probably be punished more severely than my tool, who did the act. I think the same law applies in this case. Here is a restraining order. Men are forbidden to do certain things. One, two or three men are selected as leaders; they understand the situation; they issue their commands; they give their orders; and their ignorant tools go on and perform the acts. I understand the law to be that a man who directs a thing is just as much guilty as though he went out and did the thing with his own hands; I may be mistaken, but I have ruled that way, and I think I understand the law, and shall hold that way until corrected by some superior authority. I am constrained to hold that way because I honestly believe that to be the law. Of course, I may be mistaken, but it is my duty to administer the law as I understand it, and if I do not understand it aright the parties can get their remedy from another tribunal. But I do not want to limit counsel at all. I will permit you to make any objection to any affidavit that is offered in evidence excepting the one objection that is raised upon the agreement

made in open court on the 3rd of this month, when the day was fixed for this trial and time given to parties to prepare for trial, when they were entitled to know what sort of proof would be received by the Court. It was then agreed that affidavits should be received on either side, and that oral testimony should be received on either side, either or both. Now, as to that, as I have said, I cannot permit any question to be raised in court about that. Any other exception you want to take, you may make it.

Mr. Rooker: I did not make the observation in the spirit of criticism on the effort of the Court to restrict me at all. I disclaim any intention to suggest anything of that character. I merely made it on the question of saving time.

The Court: The case is an important one; important to your client; I regard it as important that it should be understood generally that the courts have the right to protect people in the enjoyment of their property and that the trial of such a case is not a trial of a criminal case at all; it is simply a question: Has the injunction which was issued to protect the private and property rights been violated? I said that if it was invaded by a man committing a crime, the Court will punish the violation of the injunction, not because of the fact that a crime has been committed in the violation of it, and it would not regard that fact to any greater extent except as showing that the injunction had been violated—but it does not try that—it tries the single issue: Was the restraining order violated, and was it violated purposely and not innocently? If anybody made a mistake, does an act that is in violation of the restraining order by oversight, or anything of that sort, it would not hold him guilty.

Mr. Rooker: I made the general objection that was made to the Bogel affidavit.

The Court: You may have the benefit of the general objection that was made heretofore.

Mr. Rooker: It was the objection that was made to the jurisdiction of the Court.

The Court: Oh, yes; that has been presented already a dozen times, in every conceivable phase, so that if I am not in error about that it will be shown. In the first place, it appears upon the face of the information that Mr. Bessette was not a party to the original bill, nor to the original writ of injunction. He is not charged that way. He is charged by coming in and knowingly and purposely doing acts in violation of the injunction. If that does not make him answerable—I have held that it does—then he cannot be held in this case. After an injunction is issued restraining parties named in the bill, then if aiders and abettors may come into this State from Illinois, or any other State, and knowingly violate the injunction with impunity, why, then, I have been proceeding erroneously from the very start. I have held that every man, whether he is named in the injunction or not, who comes in knowing there was an injunction and who purposely and knowingly aids, abets and assists those who were enjoined in violating the injunction, is equally guilty with those who were named in the writ. Now, I may be wrong about that, but that is the law as I understand it.

Mr. Rooker: Would your Honor care, at this time, to have a presentation of the authorities on that identical question?

The Court: Oh, no; I will hear that when the evidence is taken; then I will hear you all upon all phases of it.

The affidavit of Maximillian Kieser was then read in evidence. (Record, pages 252-254.)

The Eighth Specification of Error.

The twenty-first point in the assignment of errors relates to the action of the Court in excluding the affidavit of Ida Adams. (Record, page 120.) This affidavit, and proceedings in reference to it, appear at pages 573-576. There was a large amount of evidence offered, similar to that contained in the affidavit of Miss Adams. It all went to the merit of the controversy between the W. B. Conkey Company and its employes. The evidence offered was of intolerable conditions in the service, long hours, meager wages, vile and abusive language used by Conkey toward girls in his service, etc. The law questions desired to be raised and tested were: (1) Whether Mr. Bessette had really made himself a party to the controversy by his conduct in the premises; (2) if he had so become a party and his answer was not sufficient on its face to require his discharge, then might he controvert the merits of the action; (3) ff he might not controvert the merits of the action, what defenses would be available to him in this proceeding, and (4) to demonstrate the differences between the objects of the strikers and those of Mr. Bessette. The views of the trial court are best expressed in its own language, and the record, beginning at the foot of page 573, is quoted as follows:

> Mr. Rooker: Now, if the Court please, I want to introduce the affidavit of Ida Adams in evidence, for the purpose of showing our absolute sincerity and belief in our ability to sustain the charge that Mr. Conkey was requiring services under unfair conditions.

The Court: What earthly connection has that got with this case?

Mr. Rooker: We think it has this: That this trouble was not started by the discharge of Alting, but because of the unfair conditions existing there.

The Court: I don't care whether it started by his fault or by the fault of Alting. The only material issue is, did Mr. Bessette, knowing of this restraining order, violate it; that is all I have to try.

Mr. Rooker: Well, there have been associated with Mr. Bessette a great many things that are chargeable to other people, and I spoke of that only for the purpose of illustrating our point. Suppose we would show that there had been a system that had been so intolerable that this strike started as a result of it; and under those conditions an innocent man would come in; and then the innocent man would be accused and your Honor would be called upon to determine his liability; to what extent should he be held responsible for outbreaks under such intolerant conditions?

The Court: Now, the Court will not try here the question whether or not Mr. Conkey behaved himself properly or not, or whether the men under him behaved themselves properly or not; or whether they were justified in striking; that is totally immaterial. This Court did not issue an injunction in reference to that; this Court simply issued an injunction against these men interfering with Mr. Conkey's business. That is the issue, and the only issue that Mr. Bessette is being tried for in this court; and as to his motive, it has been decided a hundred times, with which he interfered, that goes simply to the question of the amount of his punishment, but

what was the cause of the strike, whether it was the fault of one or the other, or both, that is totally immaterial.

Mr. Rooker: On the question of motive, we have the right to show that they have a motive separate and distinct from that of Mr. Bessette.

The Court: Well, the Court has ruled upon it. I don't care to hear that any further.

Mr. Rooker: Well, we will offer in evidence the affidavit of Ida Adams, and I will state to your Honor that it is quite in line with Miss Molinsky's evidence.

Mr. Newberger: We object to that as immaterial.

The Court: It may be excluded and you may have an exception.

The substance of the affidavit of Miss Adams (Record, page 575) was as follows:

Ida Adams, being first duly sworn, on oath says: I reside in the city of Hammond, Indiana, and my age is 18 years. I am a bindery girl by occupation. I entered the service of the W. B. Conkey Company on the first Monday in September, 1899, and continued to work for that company until the 20th day of August, 1901, when I, with more than 200 other girls employed in the bindery department, quit that company's service. I am now employed by R. R. Donnelly & Sons, printers and publishers, at the city of Chicago. It had become intolerable to continue in the service of the W. B. Conkey Company on account of the long hours of daily service, the meagerness of the wages paid, and the disrespectful conduct of Conkey and his forelady toward the girls in his service. These conditions we were helpless to overcome without organization,

and they were the causes leading to the organization of a union of the bindery girls employed by the W. B. Conkey Company. Our quitting the service of that company was entirely voluntary on our part and was done to bring about a change in the conditions of our service. The language and remarks of which we complained were violent and profane, and were reflections upon the characters of the girls in the service. Some of the remarks made were too vile to be repeated.

The Ninth Specification of Error.

The twenty-second assignment of error is predicated on the Court's ruling in excluding from evidence the affidavit of John Dunlavey. (Record, page 121.) This assignment constitutes the ninth specification of error. It appears, with the proceedings concerning it, on pages 576-578 of the record. It was excluded for the same reasons stated, *supra*, as to the affidavit of Ida Adams. The law questions presented by the Court's ruling include those involved in the ruling on the affidavit of Miss Adams, and the further one of fraud practiced by the complainant on the Court to obtain jurisdiction. (*Eberly vs. Moore*, 24 How. 157; *Anderson vs. Watt*, 138 U. S. 694, 701, and cases cited; *Denny vs. Pironi*, 141 U. S. 121; *Southern Express Co. vs. Todd*, 56 Fed. Rep. 104; *Danahy vs. National Bank*, 64 Fed. Rep. 148; *Hewitt vs. Story*, 64 Fed. Rep. 510; *Excelsior Co. vs. Brown*, 74 Fed. Rep. 321; *Alabama Ry. Co. vs. Carroll*, 84 Fed. Rep. 772; *Lengel vs. American Smelting Co.*, 110 Fed. Rep. 19.) The Court will note that in this case this issue was raised (1) by Mr. Bessette's special appearance and plea to the jurisdiction and (2) by his answer, and (3) that it, also, appeared upon the face of the petition for attachment.

The substance of Dunlavey's affidavit, which was made on October 7th, was as follows:

I am a resident of the State of Illinois, and have been a citizen and resident of the city of Chicago, in that State, continuously since in June, 1901. I am the same John Dunlavey who is named as a defendant by the plaintiff in the cause above entitled. At the time of the filing of the bill for an injunction in said cause I was not a citizen and resident of the State of Indiana, but was a citizen and resident of the State of Illinois. I am personally acquainted with Edward Wheed, who is also a defendant in said cause under the name of Wheed, alias "Snitzer," and I have known him for a year, during all of which time he has been a citizen and resident of the State of Illinois, and not a citizen and resident of the State of Indiana at any time. I am also personally acquainted with Oscar Kohlstadt, who is also a defendant in said cause, and I know that said Kohlstadt is a citizen and resident of the State of Illinois, and not a citizen and resident of the State of Indiana. I am also personally acquainted with Wheeler Armstrong, and know that he has resided in the city of Chicago, State of Illinois, in his lifetime, and that he was a citizen and resident of the State of Illinois at the time of the bringing of this suit. Several months ago, and long before the bringing of this suit, I explained to the foreman of the W. B. Conkey Company why it was I resided in the State of Illinois, and I believe and state the fact to be that said W. B. Conkey Company knew at the time of the filing of the bill for said injunction that I was not a citizen and resident of the State of Indiana, and I believe that said Conkey Company fraudulently made the averment that I was a citizen and resi-

dent of the State of Indiana for the purpose of having this Court assume a jurisdiction over said cause to which this Court was not lawfully entitled.

The Tenth Specification of Error.

This specification is predicated on the twenty-third assignment of error (Record, page 123), and relates to the action of the Court in excluding the offered evidence of James M. Lynch, President of the International Typographical Union, as to the controversy between the printers, on one hand, and the pressmen and bookbinders, on the other hand, over the registered label known as the "Allied Printing Trades Council" label. (Record, page 404.)

Michael Colbert, President of Chicago Typographical Union, had previously testified that there were some 2,500 union printers in Chicago; that it was desired that none of them should go to Hammond under a misapprehension of facts; that it was reported that an effort might be made to put the registered label in at Conkey's through the instrumentality of the pressmen's and the bookbinders' unions, and that, to conserve the interests of the Typographical Union in these particulars, Mr. Bessette was sent to Hammond. It had been shown that John F. Geckler, who organized the Pressmen's Union at Conkey's, and E. W. Tatum, President of the Bookbinders' Union, were upon the scene organizing the members of their crafts in Conkey's service long before Bessette went down to Hammond. The testimony of the President of the International Typographical Union was, therefore, material to show that Mr. Bessette was present to conserve a cause in which he and his associates had direct property interest—the proper use of the label and the scale of wages in the competitive district of Chicago, where they were employed, and the integrity of their

union, whose purposes are in every respect proper and lawful, and which have, by their worth, commanded the almost universal approbation of the printing world. These interests and purposes Mr. Bessette had a right to establish in order that his conduct in the premises might not be construed abstractly or solely from Conkey's point of view, but from the point of view of mutuality. The issue to Bessette and his union was that of the full dinner pail to a hungry workman and a distressed family. This issue the members of the United Typothetæ were willing to settle on the broad basis of humanity, of live and let live, of the brotherhood of man and the fatherhood of God. (Arbitration agreement, Record, pages 291-296; United Typothetæ agreement for shorter workday, Record, pages 306-307; Union Printers' Home, Record, pages 428-450; preamble, Record, page 455; cemetery statistics, Record, pages 497-521; prospectus of the Union Printers' Home, Record, pages 522-552; financial exhibit of the Union Printers' Home, Record, page 553.) The record, at page 585, discloses the ruling as to the testimony of Mr. Lynch. The offered evidence was as follows:

> Mr. Rooker: We offer to prove by this witness, in answer to this question, that there is and for more than a year last past has been a controversy between the International Typographical Union, on the one side, and the International Brotherhood of Bookbinders with the International Printing Pressmen and Assistants' Union, on the other side, as to the right of the pressmen and bookbinders to put the Allied Printing Trades Council union label in offices and on their work when not done by the members of the International Typographical Union.

The Eleventh Specification of Error.

The twenty-fourth and twenty-fifth errors assigned are as follows:

24. The finding of the Court is not sustained by sufficient evidence.

25. The finding of the Court is contrary to law.

These assignments may be considered together. They involve (1) the construction of the restraining order, (2) the interpretation of the petition for attachment, and (3) the finding of guilty of an offense for which Mr. Bessette, at the instance of a private suitor in a civil suit, could be fined $250.00 for the use and benefit of the United States.

Where is the instance in which Mr. Bessette effected an injury to the rights of the W. B. Conkey Company as they were to be conserved by the record in this cause? Nothing whatever was proven against him. Let us, in review, summarize the evidence given by the complainant's witnesses.

Anton Bruckner (Record, page 175):

113. X.-Q. Mr. Bessette wasn't a striker? A. No, sir.

114. X.-Q. You never heard Mr. Bessette call anybody vile names? A. No, sir.

115. X.-Q. Did you ever see Mr. Bessette doing anything there that wasn't gentlemanly and entirely proper? A. I never saw him doing anything out of the way; that is, in regards to not being a gentleman.

116. X.-Q. Did you ever see him commit any act of violence or commit any sort of depredation against Mr. Conkey?

A. I never was with him enough to see him.

117. X.-Q. There wasn't any reason why he should suspect you or act differently in your presence or act different than when others were around? A. No, sir.

GUS WANGEMAN (Record, pages 185-187):

53. X.-Q. Did you ever see Mr. Bessette down at the Conkey plant or around there? A. I did not.

54. X.-Q. What was the nearest to the Conkey plant that you ever saw Mr. Bessette? A. Every time I saw Mr. Bessette it was down on Homan street, near State.

55. X.-Q. And never within a mile and a quarter of the Conkey plant? A. No, sir.

* * *

By Mr. Rooker: 64. X.-Q. Did you hear Mr. Bessette say to any person that the person would be taken into the Chicago Typographical Union if he quit working for Conkey? A. I did not; I heard them tell them they would call a special meeting to take action as to whether they would do that or not.

* * *

71. X.-Q. When you saw Mr. Bessette talking with them what was the character of their conversation? Were they standing on the street or were they going somewhere? A. They were standing on the street.

72. X.-Q. As two gentlemen would meet each other? A. Yes, standing and talking together.

73. X.-Q. You don't know what they were talking about? A. No, sir.

74. X.-Q. Don't know whether they were talking about the strike or not? A. I do not.

75. X.-Q. Did you ever see Mr. Bessette do any picketing round there? A. No, I did not.

76. X.-Q. Did you ever see Mr. Bessette or hear of Mr. Bessette using any vile language or epithet toward any person? A. I never did.

77. X.-Q. Have you told us all that you ever heard Mr. Bessette say? And all that you ever saw him do about there? A. I have.

78. X.-Q. Mr. Bessette I understand was not present when you heard Alting and Grosse and some other person talk about going to import a wrecking crew from Chicago? A. No, sir.

79. X.-Q. When was that conversation with reference to the time you first saw Mr. Bessette? A. The conversation that I was present at?

80. X.-Q. No, the conversation in which the wrecking crew was talked about: when and where was that conversation?

By the Court: 81. X.-Q. I understood you, Mr. Witness, on the direct examination, to say that after the injunction had been issued that some people up there who were connected with the strike said that they would have to import a wrecking crew from Chicago to fix the men that wouldn't come out? A. Yes, sir.

82. X.-Q. That is the way I understood it: is that correct? A. That is correct.

83. X.-Q. Who were the persons? A. I give the names of those that were there. They were Alting, Grosse and—

84. X.-Q. Who was the other? A. Mr. Holke.

85. X.-Q. (By Mr. Rooker.) Do you remember when and where that conversation was about the wrecking crew with respect to when you first met Mr. Bessette or saw him? A. That conversation about the wrecking crew? I heard that on Homan street, between State and Sudway street. It was a week—or the first week in September after Labor Day.

VENA R. HUNT (Record, pages 199-200):

43. X.-Q. Did you ever hear anybody call any of these people that you had with you "rats" and "scabs," Mr. Hunt? A. No, sir, I did not.

44. X.-Q. Did you ever see any of these men who accosted you use any violence or any vile language toward you or the men with you? A. Well, I don't know as I saw them use any violence more than I spoke of taking hold of them.

45. X.-Q. It wasn't anything that any of them objected to, was it? A. I didn't think it was pleasant.

46. X.-Q. The men made no objection, did they? A. Well, they couldn't very well; the only thing they could do was to get out there and do the best we could.

47. X.-Q. The men didn't make any objection, did they? A. I don't see how they could make any objection without stirring up a fight.

48. X.-Q. What did your men say when these men spoke to them? Did they listen to them patiently? A. I always told them—

49. X.-Q. I am not asking you what you told them. They listened patiently, didn't they, to the strikers? A. They had to when waiting for the car.

50. X.-Q. And then your men made up their minds one way or the other and then acted? A. Yes.

51. X.-Q. There never was any violence committed? A. I don't think there was, no, sir.

52. X.-Q. Now you say the picketing was worse before the restraining order than afterwards? How many times since the restraining order have you been down there? A. I couldn't tell you, because sometimes I have been down there twice a day and I have been down nearly every day right along.

53. X.-Q. Not always with men? A. Yes, sometimes with one or two men. We had to send out a great many men.

54. X.-Q. Since the restraining order, how many men have you taken down there and escorted, actually escorted to the Conkey plant? A. I haven't any idea.

55. X.-Q. How many men have you had taken from you since the issuance of the restraining order? A. It would be hard to state that, either.

56. X.-Q. What is your best impression? A. Well, it might have been a dozen or fifteen.

57. X.-Q. How many men have you taken down and actually escorted to the plant? A. Well, you mean down to Hammond and clear to the plant, or that I turned over to some other officer of the company to take to the plant?

58. X.-Q. Yes. A. As high as eighty-five or one hundred.

59. X.-Q. So that you lost fifteen per cent. of the men that you took down, possibly? A. I think we did, yes, sir, about that.

60. X.-Q. Do you know, Mr. Hunt, whether or not the men that you lost there were actually seeking work or were

somebody that wanted to travel down with you and find out what the Conkey people were doing? A. Well, to the best of our knowledge, they were men who wanted to go to work. We always questioned them carefully and didn't take them unless we felt satisfied they wanted to go to work.

61. X.-Q. Did you tell them the same things that they always learned from the strikers? A. Yes, sir; we told them the situation down there. We didn't take anybody that wasn't perfectly willing to go.

62. X.-Q. You took nobody but what he said was willing to go? A. No, sir.

63. X.-Q. When these men actually quit, what did they say to you or what did you say to them about their not continuing on down to the plant? A. Well, if they went off with other fellows I didn't chase after them. I always asked them if they wouldn't come along. If they didn't choose to do so, I let them go.

64. X.-Q. They would smile at you and tell you no, wouldn't they? A. That was the size of it, yes, sir.

65. X.-Q. Now, you say you saw Mr. Bessette round there. Did you ever have a conversation with Mr. Bessette? A. No, sir, I never did.

66. X.-Q. Did you ever ask Mr. Bessette not to interfere with you or the men with you? A. No, sir, I did not.

67. X.-Q. Why didn't you tell them you would like to go unmolested? A. I didn't have anything to do with him. I attended to my business as best I could.

68. X.-Q. You never made any complaint to Mr. Bessette that his action was offensive to you. A. No, sir.

69. X.-Q. You never heard anybody else complain to him? A. I never heard anybody complain to him.

70. X.-Q. Did you ever see him do anything there that was rude or violent in any way? A. No, I didn't.

CHARLES MEYERS (Record, pages 176-181):

28. X.-Q. Did that have any effect upon you, his telling you that a man who worked for the Conkey Company was a scab and a rat? A. No, sir, only it shows his contempt for me.

29. X.-Q. It didn't have any effect upon you? A. No, sir.

D. R. HUNTINGTON (Record, pages 203-223): This witness testified in contradiction of his affidavit, previously made, that Bessette told him he had charge of the men out on strike, and that they were expecting a wrecking crew down there the next day; that Bessette told witness the boys had evil designs on him, but that if the witness would come out Bessette would call off the dogs of war. This witness was stopping at the strikers' headquarters, and he got out of bed to go to a saloon where he could get the alleged information he presumed to have. He swore that he wasn't scared, and that, while he was given a union card for work in Chicago, yet he gave that card to his children to play with because he "didn't want to work in Chicago; he wanted to work in Hammond." He described himself as a professional strike-breaker, as follows: (Record, page 221.)

199. X.-Q. Now, Mr. Huntington, you have a great deal of feeling against the Typographical Union and against Mr. Bessette, have you not? A. I have considerable feeling against the Typographical Union.

200. X.-Q. How long have you entertained that bitterness of feeling? A. For a great many years.

201. X.-Q. To what extent has that bitterness of feeling influenced your conduct? A. Well, I have gone out in times of a strike and taken men into work, and I stand ready and willing to do it again.

202. X.-Q. How long have you been pursuing that course, Mr. Huntington? A. I couldn't tell you the number of years.

203. X.-Q. How many years have you gotten men to take the place of people who quit work? A. Good many times.

204. X.-Q. And you were doing that always because of your hostility to the Typographical Union? A. Yes.

205. X.-Q. Do you have that same feeling against Mr. Bessette that you have toward the Typographical Union? A. No; I have no feeling against Mr. Bessette particularly until he molests me, and the man that molests me or my family, he must look out, for I am going after him.

206. X.-Q. And to what extent does that bitterness influence your testimony in this case? A. Not one particle.

207. X.-Q. And to what extent did that influence your deposition that you made before Mr. Bogle on the 10th of September? A. I stated there the truth.

208. X.-Q. The question is, did it influence you—your feeling of hostility toward the Typographical Union or Mr. Bessette—did it influence you as to what you stated in your affidavit? A. No, sir; it didn't influence me a particle at the time I made the affidavit.

209. X.-Q. Did you ever have any experience with this wrecking crew yourself?

The Court: You need not answer that unless it is confined to this wrecking crew at Hammond.

210. X.-Q. That is what I meant—at Conkey's? A. No, sir.

211. X.-Q. Did you ever see the wrecking crew or members of it? A. No, sir.

The testimony of Huntington as to what occurred at Fitzpatrick's saloon was controverted by all the people present, as well as by Huntington's previous affidavit. The two statements of Huntington can not be reconciled, and his testimony shows that he was unworthy of belief. For the Court to place upon him the garb of an honest workingman was worse than taking the coat of Joseph and turning it over to Benjamin; it was like putting it upon a Judas.

Louis Florence (Record, pages 228-229):

103. X.-Q. You spoke about some members of a wrecking crew and gave their names that were going out to fight. Who were those fellows? Yourself was one? A. Yes.

104. X.-Q. Who were the others? A. Gus Collins.

105. X.-Q. And who else? A. Hugh Wiley.

106. X.-Q. Yes, and who else? A. Pat Rice.

107. X.-Q. R-i-c-e? A. Any old way.

108. X.-Q. Well, which is it—Wright or Rice? A. Rice.

109. X.-Q. Who else? A. A whole gang.

110. X.-Q. Well, do you know any of the others? A. I know them all, but I can't think of them.

111. X.-Q. How long have you known them? A. Ever since I have been there.

112. X.-Q. They were all former employes of the Conkey Company, were they? A. Yes, sir.

113. X.-Q. Were any of them thugs from Chicago? A. I don't know that.

114. X.-Q. You know all of the fellows that were with you? A. Yes, sir.

115. X.-Q. None of them were pressfeeders from Chicago? A. No, sir.

116. X.-Q. About what were their ages? About your age? A. We had some bald-headed men in there.

117. X.-Q. But they were all men that you had become acquainted with in the service of Mr. Conkey? A. Yes, sir.

118. X.-Q. Were there any members of any of the Chicago labor organizations in that crowd? A. No.

119. X.-Q. Did you see Mr. Bessette there or about there on that occasion? A. No, sir.

* * *

122. X.-Q. Did you ever hear him countenance any violence or anything of that sort? A. No, sir.

123. X.-Q. Did you ever hear him countenance any vile language? A. No, sir.

124. X.-Q. He was always conducting himself as a gentleman? A. Yes, sir.

125. X.-Q. He showed no disposition to fight or to make any trouble, did he? A. I just told you I never talked with him.

I submit, in all confidence, there was no evidence upon which Mr Bessette could be fairly convicted of doing an injury to the W. B. Conkey Company within the prohibition of the restraining order. And it would seem that the Circuit Court was likewise persuaded, for the Court gave no relief to the W. B. Conkey Company; the fine was made payable to the United States. (Record, page 608.)

Such uncertainty as to the outcome was forecasted by the learned judge who tried the cause, for at different periods throughout the trial his remarks indicated that Mr. Bessette was being tried (1) for the violation of a restraining order, (2) for the contemptuous obstruction of the due administration of justice, and (3) for conspiring to do an unlawful act. In this view of the record the comments of Mr. Justice Matthews on the Massachusetts Bill of Rights seem to have particular significance. (*Yick Wo vs. Hopkins*, 118 U. S. 365.)

The trial Court's reflections upon labor organizations seem also to require consideration. In *Railroad Company vs. Stout*, 17 Wall., at page 664, Mr. Justice Stout, speaking for the Court, said: "Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

And in these observations the Supreme Court merely reiterated Blackstone's famous tribute to the jury system.

The trial Court's comments on the fact that the strikers desisted when the restraining order was issued seem, also, to be a misconception. It is true that American citizens desist under such circumstances. But it is not from cowardice nor from any repentant sense of previous error; it is rather because American citizens are

respectful of the law than that they fear the courts, which are their own institutions. It is seldom such observations as those made by the trial Court appear in the literature of the judiciary, but even in those instances the courts would not be less esteemed by the people if the courts ascribed some credit to the good character of American citizenship as a factor in bringing order out of chaos.

CONCLUDING SUMMARY.

The following conclusions arise out of the foregoing statutes and authorities, and the extracts from the record of the Court.

The trial Court's theory is conclusively shown by the record to have been that Bessette was charged with contempt of Court for violating a restraining order. If it were admitted, as upon demurrer, that the petitioner's evidence was wholly true, and that the defendant's evidence was withdrawn, and that all reasonable inferences were to be drawn against Bessette, still Mr. Bessette committed no offense for which he could be lawfully punished in this proceeding. The charge being one of indirect contempt, I submit:

The offense of obstructing the due administration of justice is wholly distinct and different from the offense of violating a restraining order, for

a. The offense of obstructing the due administration of justice is a statutory crime against the sovereign. (R. S., Sec. 5399.)

The offense of violating a restraining order is a fiction of equity to conserve the rights of the litigants and the dignity of the Court in which the order was made.

b. The offense of obstructing the due administration is to be tried within the venue of the wrongful act and does not depend upon the residence of the defendant.

The offense of violating a restraining order, in suits where the jurisdiction depends solely upon diverse citizenship, can be tried only by a court having jurisdiction over the place of the defendant's residence, and the venue of the wrongful act is wholly immaterial.

c. The offense of obstructing the due administration of justice is punishable with a fine, punitive in its nature, intended to reform the culprit and to deter others, and the fine goes exclusively to the use and benefit of the sovereign.

The offense of violating a restraining order is punishable by a fine remedial in its nature, intended to be compensatory and for the use and benefit of the party aggrieved; imprisonment may be conditionally added to enforce obedience and restitution.

d. The offense of obstructing the due administration of justice may be a subject for presentment by a grand jury and for trial by jury.

The offense of violating a restraining order is never a subject for presentment by a grand jury or for trial by jury.

e. The offense of obstructing the due administration of justice, as such, is punishable by a court of equity in contempt proceedings only when the offensive act is so near as to disturb the Court.

The offense of violating a restraining order is always punishable by a court of equity in contempt proceedings and never otherwise.

When we come to consider the nature of contempt proceedings we find the broadest distinction between the duties and powers of courts over persons and the duties and powers of courts over things. A mere *lis pendens* is not the equivalent of *res in custodia legis*, when it comes to invoking the powers of a court of equity in proceedings to punish for indirect contempt.

a. A judgment or proceeding strictly *in personam* depends for its validity upon jurisdiction over the person, and that, in turn, may depend upon the place of residence of the parties, and there is no *res* to come into the custody of the Court. (Chief Justice Marshall, in *Mankin vs. Chandler Company*, 2 Brock. 125; S. C., Fed. Cas. 9030; *Woodruff vs. Taylor*, 20 Verm. 65; *Cross vs. Armstrong*, 44 Ohio St. 623; *Robinson vs. Hurley*, 11 Ia. 410.)

A judgment or proceeding *in rem* depends for its validity upon jurisdiction over the thing and the place of residence of the parties and is wholly immaterial.

b. A *lis pendens* may be entirely personal in its application so that the Court will act throughout the proceeding solely with respect to the parties.

Res in custodia legis can never be entirely or strictly personal in the Court's application of the law, nor can the Court ever act upon the parties without consideration for the subject matter.

c. A mere *lis pendens* may result in a purely personal judgment.

Res in custodia legis can never be conserved by a merely personal judgment.

d. In acting *in personam* the Court must by its powers acquire jurisdiction of the parties who are to be found.

In acting *in rem* the Court must by its process acquire jurisdiction of the thing, and the jurisdiction so acquired binds the world.

e. In proceeding for indirect contempt, in suits *in personam*, the Court cannot act except upon a party to the record, either specifically so made, *eo nomine*, or included in a class whence his identification may be properly established if required. (*In re Lennen*, 166 U. S. 548.)

In proceeding for indirect contempt in actions *in rem* the Court may always act upon everybody whose conduct affects the *res*, and no one can be a stranger to a proceeding *in rem* whose acts bear upon the property which is properly in the custody of the Court. (*Arthur vs. Oakes*, 63 Fed. Rep. 310.)

f. In proceeding for indirect contempt in suits *in personam* a stranger to the record can not be held unless he offend so "near" to the Court as to obstruct the administration of justice. (R. S., Sec. 725.) And in this statute the words "near to the Court" relate to the propinquity of the act, and not to its cause or sequence. (*In re Savin*, 131 U. S. 267.)

In proceedings for indirect contempt in actions *in rem* a stranger to the record offends when he disturbs the possession of the Court anywhere within its territorial jurisdiction. The considerations for this rule are wholly different from those which apply wherein suit is *in personam*. (*Mankin vs. Chandler Co.*, 2 Brock. 125, Fed. Cas. 9030; *Pennoyer vs. Neff*, 95 U. S. 714; *McArthur vs. Scott*, 113 U. S. 340, 387; *Brigham vs. Fairweather*, 140 Mass. 413.)

In the suit out of which this proceeding arises the W. B. Conkey Company has not submitted its property or franchises to the custody of or administration by the Court (*Arthur vs. Oakes*, 63 Fed. Rep. 310), so that there was no *res* involved. Nor was there any Federal question involved. (*In re Lennen*, 166 U. S. 548). Nor was there any public duty to be performed or any public right in peril. (*In re Debs*, 158 U. S. 564.) But the complainant reserving to itself the management and control of all its property and rights, and without any Federal question, right or duty, but predicating its appeal to the jurisdiction of a United States Court solely upon the ground of diverse citizenship, it asks an order against certain defendants, whom the complainant elects to sue, to restrain those persons from the commission of trespasses, and it asks the Court to grant in these premises as against a stranger the same exercise of great powers which would be granted in the event the very custody of the Court over property, or its jurisdiction over defendants subpoenaed, were assaulted and put in jeopardy.

In these respects the record falls short of showing a valid judgment against Mr. Bessette, viz.:

a. The original proceeding or suit was *in personam* and not *in rem*.

b. The appellant was a stranger, both in name and class, to the original proceedings and to the restraining order.

c. The alleged offense was not committed so "near to the Court" as to disturb its proceedings or obstruct the administration of justice, but was some 200 miles distant from the Court and at a time when, in fact, the Court was not in session.

The rights of the accused, if he were answerable to the process of the Court upon the petition for attachment, were:

(1) A strict construction of the restraining order.

(2) The restraining order must not be enlarged upon the hearing so as to include either time, place or act not strictly within the terms of the order.

(3) The charge must be clearly proved in every essential particular.

Whatever confusion in the practice this Court may find exists, in cases of this character, it seems might hereafter be prevented by enlarging the scope of the equity rules. Upon the incoming of a bill for an injunction, a bill *quia timet*, showing that the operations of an industrial enterprise had been or were about to be suspended or disturbed, the Court on finding that the proofs warranted an injunction should take exclusive possession of the property by a receiver or otherwise and operate it, so long as there was just ground for fear. In that event each party to the controversy would be required to deal directly with a representative of the sovereign power. The result might not mean compulsory arbitration, but it would be persuasive of arbitration of some kind. In any event the continued operation of the plant would conserve the public welfare and remove much of the temptation that now exists to commit perjury and abuse the processes of the law.

In conclusion we submit (1) that the United States Circuit Court for the District of Indiana was without jurisdiction in this suit to grant remedial relief to one citizen and resident of Illinois against another citizen and resident of Illinois; (2) that the relief sought by the plaintiff and against Bessette was purely remedial; (3) that the Court was without authority to enter a punitive fine against Bessette in this proceeding; (4) that the first, second and third questions certified by the Circuit Court of Appeals should be

answered in the affirmative, the last question not being material to this case; (5) that this Court should upon consideration of the whole record reverse the judgment against Bessette and remand the cause to the United States Circuit Court for the District of Indiana with directions to sustain Bessette's special plea in to the jurisdiction and for such further relief as to this Court may seem proper.

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

Indianapolis, Ind., October 1, 1902.

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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No. 482. 142.

EDWARD E. BESSETTE,
Appellant.

vs.

W. B. CONKEY COMPANY,
Appellee.

APPELLANT'S MOTION TO ADVANCE.

(Memorandum Attached.)

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

Burford Print Indianapolis.

12626

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No. 462.

EDWARD E. BESSETTE,
Appellant,

vs.

W. B. CONKEY COMPANY,
Appellee.

APPELLANT'S MOTION TO ADVANCE.

(Memorandum Attached.)

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No. 462.

EDWARD E. BESSETTE,
Appellant,

vs.

W. B. CONKEY COMPANY,
Appellee.

APPELLANT'S MOTION TO ADVANCE.

(Memorandum Attached.)

The appellant, Edward E. Bessette, moves the Honorable the Supreme Court of the United States to advance on its docket the cause above entitled, and for his reasons, the appellant saith:

1. The cause comes here on a certificate from the United States Circuit Court of Appeals for the Seventh Circuit, that Court desiring the advice and instruction of the Supreme Court on the following questions of law, viz.:

> First. Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of a Circuit Court

of the United States, finding a person guilty of contempt for violation of an order of that Court and imposing a fine for the contempt.

Second. Whether the "act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes," approved March 3, 1891 (26 Stat. 826), authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that Court made in such suit, and imposing a fine for such contempt.

Third. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error.

2. The case involves and affects a matter of general public interest in that the issues presented require a construction, as a question of first impression in this Court, of the Act of Congress approved March 3, 1891, creating the United States Circuit Court of Appeals, with respect to the jurisdiction of that Court to review upon appeal a judgment of a Circuit Court convicting a party of contempt for the violation of an injunction, which jurisdiction this appellant contends exists by virtue of Section 6 of said act which provides that said Court of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the District Courts and in the existing Circuit Courts *in all cases*

other than those provided for in the preceding section of this act (relating to jurisdiction of the Supreme Court) *unless otherwise provided by law,*" etc.

3. Because of the uncertain state of the law respecting the right to an appellate review of those condemned as this appellant was, by a judgment convicting him of contempt, and imposing a penalty, with respect to which uncertainty in the law the appellant begs to state the following specifications:

It is unquestionable that in England, for many years, it was deemed essential to the due administration of justice, that every Court, at least of the superior kind, in which great confidence was placed, must be the sole judge of contempts arising therein (*The Earl of Shaftsbury's case, A State Trials, 615*); and that the sole adjudication of contempts and punishment thereof belonged exclusively and without interfering, to each respective Court.

The distinction between adjudications for contempt which interfered with the rights of the parties, and those which assailed the dignity of the Court, has become so well recognized in that country, as that it is now spoken of as a platitude. In *Seaward vs. Paterson* (1897), 76 Law T. (N. S.) 215, one Murray endeavored to confuse the two classes of cases by making that defense to a charge of contempt in obstructing the due administration of justice which would be available only against a charge of contempt for violating an injunction. The Court said:

> "The notice of motion to commit for breach of an injunction, which is technically wrong, unless he is bound by the injunction, and a notice of motion to commit a man for contempt of Court, not because he is bound by the injunction by being a party to the case or anything of that kind, but because he is conducting himself so as to obstruct

> the course of justice, are totally different things. The difference is very marked. In the one case the party who is bound by the injunction is proceeded against. The proceedings against him are for the purpose of enforcing an order of the Court for the benefit of the person who got the order. In the other case the Court will not allow its process to be set at naught and treated with contempt. The consequence is this: that in the one case the party who is interested in enforcing the order is enforcing it for his own benefit, while in the other case, if the order of the Court has been contumaciously set at naught, he can not settle it with the person so acting and save that person the consequences of his act. The difference between the two kinds of contempt is well known, although in some cases there may be a little difficulty in saying on which side of the line they fall."

To the same effect is the case of *Wellesley vs. Earl of Mornington*, 11 Beav. 181. This last case is cited with approval by Judge, now Mr. Justice, Brown, in *Phillips vs. City of Detroit*, 19 Fed. Cas. 512 (No. 11101), by the Supreme Court in *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110, and by the United States Circuit Court in *American Steel and Wire Co. vs. Wire Drawers' and Die Makers' Unions*, Nos. 1 and 3, 90 Fed. 598, and in 2 Daniell, Ch. Prac. (5th ed.), p. 1685.

In this country that same distinction is drawn, and in most of the states, by statute, an appeal is allowed from an adjudication for contempt for violation of an injunctional order in a suit, which violation worked an injury to a party, and the punishment imposed was damages awarded to the party. In such cases the statutes, in many states, have expressly allowed an appeal, treating such adjudication for contempt as a civil proceeding.

In the federal jurisprudence, up to the time of the establishment of Circuit Courts of Appeals, it was controverted whether an appeal could be entertained to review an adjudication for contempt in a case where the dignity of the Court had been invaded. Appeals in other cases of contempt were allowed. As early as 1812, in *Ex parte Kearney*, 7 Wheat. 38, the Supreme Court, speaking through Mr. Justice Story, held upon *habeas corpus*, that where one was committed for contempt by a Court of competent jurisdiction for refusal to answer as a witness, the Court issuing the writ of *habeas corpus* could not inquire into the sufficiency of the cause of commitment.

The Supreme Court, in some cases, seems to have treated an adjudication for contempt as a criminal proceeding. Thus, in the year 1874, in *New Orleans vs. Steamship Company*, 20 Wall. 387, the Court say:

> "The fine of three hundred dollars imposed upon the Mayor is beyond our jurisdiction. Contempt of Court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This Court can take cognizance of a criminal case only upon a certificate of division in opinion."

There the Mayor of the city was fined for contempt in prosecuting another suit and obtaining an injunction in another suit.

In *Hayes vs. Fischer* (1880), 102 U. S. 121, upon a *writ of error* from an adjudication for contempt against *a party to the suit, charged with violating an injunction*, the Court say:

"If the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this Court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it can not be re-examined here, either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, 7 Wheat. 38, and the rule then established was followed as late as *New Orleans vs. Steamship Company*, 20 Wall. 387. It follows that we have no jurisdiction."

In *Worden vs. Searls*, 121 U. S. 14 (1886), the Court again recognized the distinctions in procedure stated in *Hayes vs. Fischer*, *supra*, and sustained an appeal. Orders convicting the appellants of contempt in violating an injunction were reviewed and vacated. The Court distinguished *Ex parte Kearney*, *supra*, and *New Orleans vs. Steamship Company*, *supra*. At pages 24 and 25, the Court said:

"The appellants ask for a review and reversal of the orders imposing fines for a violation of the preliminary injunction. The appellee contends that this Court can not review the action of the Circuit Court in punishing a contempt committed by a violation of such injunction, (1) because the proceedings were criminal in their character; (2) because the action of the Circuit Court is, by Section 725 of the Revised Statutes, expressly made discretionary.

"All the proceedings, which resulted in the imposition of the fines, were taken and entitled in the suit. The order of March 6, 1882, is entitled in the suit, and adjudges 'that

the said defendants are guilty of the contempt charged against them for a violation of the injunction issued in this cause, and that said defendants, Alva Worden and John S. Worden, pay to said complainant, Anson Searls, the sum of two hundred and fifty dollars, as a fine for said violation, together with costs of said proceedings, to be taxed, and that said defendant stand committed until the same be paid.' The order of October 9, 1882, is entitled in the suit, and orders 'that said defendants, Alva Worden and John S. Worden, do pay a fine of eleven hundred and eighty-two dollars to the Clerk of this Court, to be paid over by said Clerk to complainant for damages and costs, and that said defendants do stand committed until the same is paid.' It appears that the $1,182 was made up of $682, the profits of the defendants on 62 gross of whip-sockets sold, and $500, expenses of the plaintiff in the contempt proceedings.

"We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness of propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent."

Followed (1896) as to remedial fines in *Indianapolis Water Co. vs. American Strawboard Co.*, 75 Fed. 978.

In 1894, *In re Debs*, 158 U. S. 564, the Court reviewed, on *habeas corpus*, the commitment of Debs, a party to the suit, for contempt, by the Circuit Court of the United States for the Northern District of Illinois. The petitioner had first applied for a writ of error. That petition was denied (159 U. S. 251), upon the

ground, as stated in 158 U. S. 573, that the order of the Circuit Court was not a final judgment or decree, though that would seem to be opposed to the doctrine in 20 Wallace, 387.

In re Chetwood, petitioner (1896), 165 U. S. 443, the Chief Justice, delivering the opinion of the Court upon an application for a writ of *certiorari* to revise or annul the order of the lower Court as being in excess of jurisdiction, though imposed against a party to a suit, charged with contempt, remarked:

> "Judgments in proceedings in contempt are not reviewable here on error or appeal. *Hayes vs. Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573; 159 U. S. 251; but they may be reached by *certiorari* in the absence of any other adequate remedy."

In *Tinsley vs. Anderson* (1898), 171 U. S. 101, Tinsley obtained from the Circuit Court of the United States a writ of *habeas corpus* upon the ground that he was deprived of his liberty by the judgment of the Texas Court without due process of law and in violation of the Constitution of the United States. Tinsley was a party to the suit and was charged with resisting the process of the Court. The Circuit Court dismissed the writ and remanded the prisoner and he appealed to the Supreme Court, and also sued out a writ of error from the Supreme Court to review the judgment of the Court of Criminal Appeals of Texas. In this case the Court, at page 105, put the doctrine with regard to jurisdiction of appeals, or writs of error, from adjudications of commitment by the Circuit Court or District Courts of the United States, in proceedings which are independent of the principal suit, upon the ground that they were judgments in criminal cases, and that this Court had no appellate jurisdiction in such cases.

MEMORANDUM: Up to the Act of 1891, establishing the Circuit Courts of Appeals, it appears that where the contempt proceeding was remedial, it would be reviewed on a proper appeal, but where the contempt proceeding was punitive, there was no jurisdiction to review in an appellate court.

Was this jurisdiction to review in contempt cases of every character finally conferred by that act upon the Circuit Courts of Appeals? The act is entitled "An act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes." For the first time Congress conferred appellate jurisdiction in criminal cases. By Section 5, that jurisdiction was conferred upon the Supreme Court "In any cases of a conviction of a capital or otherwise infamous crime." Section 6 provides that the Circuit Court of Appeals shall exercise appellate jurisdiction to review by appeal, or writ of error, final decisions in the District Court and existing Circuit Courts in all cases other than those provided for in the preceding section of the act which defines the jurisdiction of the Supreme Court, and it provides that the judgment or decrees of the Court of Appeals shall be final, (1) in all cases where the jurisdiction is dependent entirely upon the opposite party to the suit in controversy being aliens and citizens of the United States, or citizens of different states; (2) in all cases under the patent laws, under the revenue laws, under the criminal laws and in admiralty cases.

Is an adjudication for contempt a case under the laws of the United States? It is a fair presumption that Congress designed by this act to include contempts under that head, for two reasons, (1) In appreciation of the correct results attained in the procedure

in those states where an appellate review is allowed by statute, and (2) in order that this Court, or the Courts of Appeals might correct inequalities in the law which exist in different sections of the country and establish a uniform procedure that would better conserve the administration of justice. It can not be urged effectively that the phrase "all other *cases*, etc.," used in the act means only prosecutions for violation of statute law or prosecutions for offenses created by the statutes of the United States, and therefore excludes contempt proceedings. Contempt of Court, where the proceeding is punitive, as distinguished from remedial, is not only a distinct statutory offense, but this Court, prior to the passage of the Act of 1891, had repeatedly used the word "case" as the appropriate name for such proceedings.

Hayes vs. Fischer, supra;
New Orleans vs. Steamship Co., supra;
In re Debs, supra (158 U. S.).

Congress used only the same designation this Court had previously adopted, and the same designation that had been used in respect to the statutory crime of contempt.

See *Ex parte Robinson*, 19 Wall. 505; *In re Savin*, 131 U. S. 267, as to the statutory offense of contempt of Court.

A contempt, where the proceeding is remedial, is not made a crime by the statutes of the United States (*Ex parte Reese*, 107 Fed. 942 and cases cited). The power of punishing for contempt as a remedy at the instance of a private suitor is inherent in the Courts, and is not given by statute, although sometimes regulated by statute (*Ex parte Robinson*, supra; *In re Savin*, supra).

In *Sessions vs. Gould*, 11 C. C. A. 550, the Second Circuit held that an order adjudging a party in contempt could not be reviewed

by an appeal, intimating that it might be done by writ of error. The case was subsequently brought up by writ of error, *Gould vs. Sessions*, 14 C. C. A. 366, and there reviewed, the Court holding that it was a judgment in a criminal case and it had jurisdiction under the act creating the Court. But in *Nassau Electric R. Co. vs. Sprague Electric Railway and Motor Company*, 95 Fed. 415, in 1899, the same Court, upon a writ of error from a judgment of commitment against a party for violation of an injunction, dismissed the writ, reversing their previous ruling upon the authority of the Debs case, and held that such order could only be reviewed by an appeal from the final decree in the cause in which the order was issued.

In the Circuit Court of Appeals a writ of *certiorari* was allowed upon the motion of the appellee bringing up the final decree in this cause. The appellee is possibly concluded by that motion and the action of the Court thereon from asserting (1) that the final decree is not germane to the proceedings against Bessette or *vice versa*, and (2) that this Court can not do justice to all parties, because of a diminution of the record. It is indeed a question whether this Court might not properly hold that by the act of supplementing the record on the writ of *certiorari* the appellee had authorized the Circuit Court of Appeals to treat this case now as within the rule stated *In re Chetwood*, 165 U. S. 443.

There is this danger attending the Debs case as a precedent: In that case the United States sought a civil remedy by injunction. The United States appeared, therefore, upon the face of the record as a complainant, just as it would have done had the proceeding been criminal. The people are so used to seeing the name of

the Government appear in a criminal case, that all cases are likely to be regarded as criminal, if it appears that the Government is the complainant. Those who indifferently determine the nature of the cause by ascertaining the parties to it might be misled by the Debs case into the assumption that that proceeding was punitive when it was in fact remedial. A writ of error was clearly an inappropriate remedy, and a review by appeal was not asked, so that on that point the Debs case would be *obiter*.

This misapprehension of the true purport of the Debs case is augmented by the prominence of that case and the notoriety of the facts upon which the suit was based. In commenting on the right of trial by jury, Mr. Justice Brewer, speaking for the Court, remarked that every Court must be the sole judge of contempts committed therein. That was a correct statement of the rule as it bore upon the issue presented—the right of trial by jury. The Court was not called upon to speak, and it did not speak as to the right of an appellate review by appeal. Aside from the reasons given by the Court, it is clear that a jury was properly denied Debs. The proceedings throughout were in chancery. In so far as its own agencies are concerned, a United States Court of Chancery does not know what a jury is. There is no process available to obtain a jury and no authority in law for a chancellor to obligate a jury or to transfer to it any of the duties which the chancellor must perform in discharge of his office. If the Circuit Court had called "a jury" to try Debs, it would have abdicated important functions to strangers, those whom the law knew not, those whose presence were not provided for by law. A federal judge can not delegate any of his powers. He can not call a by-

stander to perform any of those judicial functions which the Constitution requires shall be performed by judges whom the President "shall nominate and by and with the advice and consent of the Senate shall appoint."

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
Attorney for the Appellant, Edward E. Bessette.

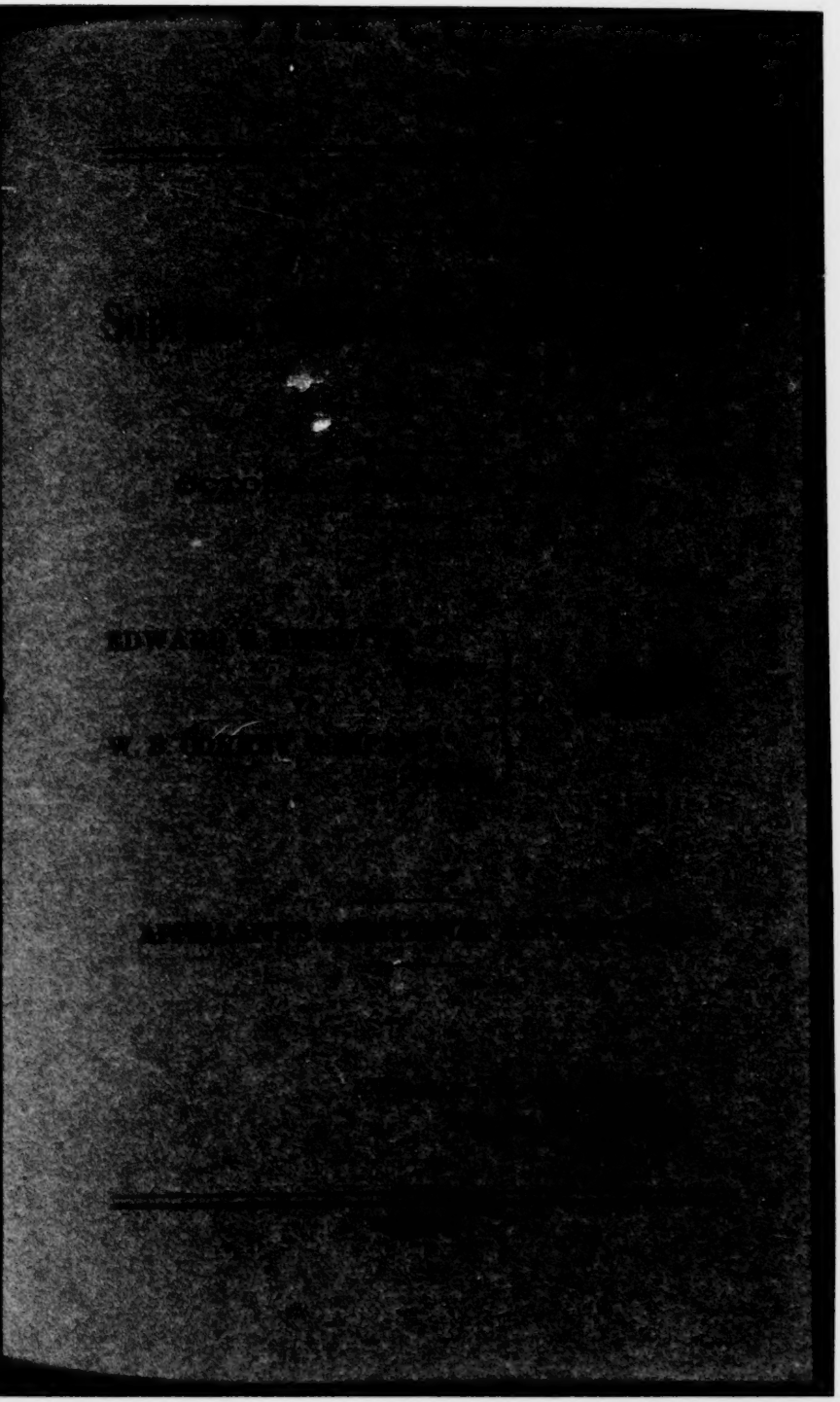
Indianapolis, Ind., January 8, 1903.

The W. B. Conkey Company, appellee in the cause above entitled, will take notice that on Monday, the 19th day of January, A. D. 1903, or as soon thereafter as counsel can be heard, Edward E. Bessette, the appellant, will, at the court room of the Supreme Court of the United States, in the City of Washington, D. C., present the foregoing motion to the Honorable the Supreme Court of the United States and thereupon ask that said motion be heard.

WILLIAM VELPEAU ROOKER,
As Attorney for Appellant, Edward E. Bessette.

We hereby acknowledge the receipt of a copy of the foreging motion and notice this 8th day of January, A. D. 1903.

MORRIS & NEWBERGER,
Of Attorneys for the Appellee, The W. B. Conkey Company.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

EDWARD E. BESSETTE,
Appellant,
v.
W. B. CONKEY COMPANY,
Appellee.
No. ——.

APPELLANT'S ADDITIONAL AUTHORITIES.

CONTENTS OF THIS MEMORANDUM.

This memorandum contains a digest of all the reported cases of contempt of court determined in the circuit and district courts of the United States. It includes, also, an historical allusion to the Judiciary Act of 1789, authorizing the courts to punish for contempt, and to the amendatory act of 1831. An act of congress concerning the issuance of injunctions is set forth, as are, also, certain rules of this court prescribing the method of procedure in contempt cases. The purposes of the court of appeals as those purposes have been stated by this court, are recited. The manner in which cases of contempt were treated with respect to review on writ of error or by appeal prior to 1891

is set forth in the light of decided cases. Much attention is given to the nature of contempt proceedings, demonstrating that they may be civil and criminal, or private and public, or remedial and punitive, as the case may be, and the decisions are reviewed for the purpose of ascertaining, if possible, the law of the land with respect to this interesting branch of jurisprudence. It is found that resort to contempt proceedings has been had for both remedial and punitive purposes. The remedial objects are sometimes attained by orders which are coercive and prohibitory, for the purpose of compelling obedience in matters of procedure and sometimes by orders which are coercive and mandatory. A numerical summary is made and set forth in a table which classifies the cases (1) geographically by circuits, and (2) according to the causes for which the proceeding may be maintained, as those causes are stated in the act of congress concerning contempt. R. S., Sec. 725. A special column has been set apart for cases of orders against workingmen, and into that column are collected all the cases in which injunctions have been violated by workingmen. In addition to the cases set forth in that column there have been some instances in which the industrial classes have been punished for interfering with property in the hands of receivers; but the column relating to interference with property contains all the cases of such interference by whomsoever committed. It appears that out of the 180 reported cases only sixteen have been instituted against workingmen since the birth of the government, and that all those sixteen cases were confined

to the fourth, sixth and seventh circuits, with the exception of two instances in the eighth circuit. In the first, second, third, fifth and ninth circuits the procedure appears not to be used in labor controversies. In the fourth circuit the procedure seems to prevail only in the Virginias. The eighth circuit has, as the reported cases show, ceased to resort to the remedy against workingmen, so that this branch of jurisprudence appears now to be recognized as potential only in the sixth and seventh circuits and in part of the fourth circuit.

There are, no doubt, many deficiencies in the work here undertaken, but the writer has done it with the hope that the results, though they may not accomplish all that the court requires, will nevertheless be useful.

It may be noted that the law of contempt has often involved cases of the greatest magnitude and in which the nation has needed the wisdom of this court in the solution of the issues. Among such cases are the treason trials of Aaron Burr, the conflict between the army and the judiciary as demonstrated in the imprisonment of Judge Hall and the fining of General Andrew Jackson for contempt of court at New Orleans in 1815, the impeachment of Judge Peck, the effort of President Lincoln to suspend the writ of habeas corpus without an act of congress, cases arising under the Interstate Commerce Act and wherein the United States appears as a civil litigant, the efforts of St. Clair county, Missouri, to repudiate certain obligations, and the controversy between the court of appeals for the ninth circuit and the federal courts in Alaska.

The matter is arranged under the following subtitles:

HISTORY OF THE JUDICIARY ACT. SOME EARLY CASES.

TO PUNISH FOR CONTEMPT IS THE EXERCISE OF JUDICIAL POWER.

JURISDICTION OF THE PERSON AND RULES OF PROCEDURE.

THERE MUST BE PRIVITY OF INTEREST IN THE ACTORS IN CIVIL CONTEMPT.

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THE OFFENSE IS CRIMINAL WHEN COMMITTED AGAINST THE COURT OR THE AGENCIES OF THE COURT AND THE FINE IS PUNITIVE.

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FINAL AND INTERLOCUTORY ORDERS IN THE SUIT. CONTEMPT PROCEEDINGS ARE INTERLOCUTORY IN EQUITY AND HAVE THE LEGAL EFFECT OF AN ORDER CONTINUING THE INJUNCTION.

MEANING OF THE WORD "CASE" AND HEREIN REFERENCE IS MADE TO PROCEEDINGS APART FROM THE ENFORCEMENT OF CIVIL REMEDIES.

TABLE.

REVIEW IN CONTEMPT PROCEEDINGS SINCE THE CIRCUIT COURT OF APPEALS WAS CREATED.

The History of the Judiciary Act. Some Early Cases.

In December, 1825, Judge James H. Peck, of the United States District Court for the District of Missouri, decided against the claims of the widow and children of Antoine Soulard to certain lands in Missouri and in the then territory of Arkansas. Luke E. Lawless of St. Louis had been one of counsel in prosecuting the claims. Mr. Lawless wrote an article for a St. Louis newspaper in which he enumerated the errors into which the trial judge had fallen. In April, 1826, Judge Peck summoned Mr. Lawless and proposed to propound to him certain interrogatories in a proceeding to punish for contempt. Mr. Lawless declined to answer the interrogatories. He was adjudged guilty of contempt, was disbarred from practice, and committed to prison. Mr. Lawless complained to congress. The judiciary committee of the House reported articles of impeachment which were adopted at the first session of the twentieth congress, at which session the senate was organized as a court of impeachment

though the impeachment trial did not take place in the senate till the second session. In the impeachment of Judge Peck congress followed the precedents established in the impeachment of Judge Samuel Chase in 1804. In the impeachment of Judge Peck the learned counsel in their arguments reviewed exhaustively the powers of the courts of England in the exercise of their common law jurisdiction and discussed the abridgment of those powers by the constitution of the United States and the judiciary act of 1789. The trial of Judge Peck resulted in his favor by a vote of 21 for and 22 against impeachment, but immediately thereafter Mr. James Buchanan, chairman of the judiciary committee of the House, presented a bill limiting the power of the courts to punish for contempt. The bill was passed in the senate, by a large majority, as the act of March 2, 1831, and remains in force as section 725 of the revised statutes.

The judiciary act of 1789 was reported by Oliver Ellsworth, chairman of the judiciary committee of the senate. It was passed substantially as reported. Judge Ellsworth was a member of the federal constitutional convention in 1787, a United States senator in 1789, was chief justice of this court from 1796 to 1800, resigning his office while in France with Patrick Henry and William Davie to secure a treaty.

Perhaps the most notable case involving the law of contempt, prior to Judge Peck's case, was that in which Gen. Andrew Jackson was fined one thousand dollars by Judge Hall in the United States circuit court at New Orleans

in March, 1815. General Jackson had refused to recognize a writ of habeas corpus issued out of Judge Hall's court while New Orleans was under martial law. In addition to refusing to respect the writ, General Jackson placed Judge Hall under military arrest for having issued the writ. The day after Judge Hall's release he summoned General Jackson to appear in court and fined him one thousand dollars. The fine was refunded to Jackson by act of congress in 1844, with interest. The proceedings were prima facie so summary that the case is not reported.

In Ex parte Poulson, 15 Haz. Reg. Pa. (1835) 380; 19 Fed. Cases No. 11,350, decided by Mr. Justice Baldwin in 1835, the circumstances are stated under which the amendatory act of 1831 was passed. Justice Baldwin had before him a motion for a rule on Poulson, editor of the American Daily Advertiser of Philadelphia, to show cause why an attachment should not issue against him for a contempt of court in publishing an offensive article concerning a party whose cause was at the time on trial in Philadelphia. The court reviewed the original provisions of the judiciary act and then stated the facts concerning the impeachment of Judge Peck, who had punished a lawyer for publishing a newspaper article offensive to the court, which had decided adversely to the writer a recent suit. Justice Baldwin held that the purpose of the amendatory act was to deprive the courts of power to protect suitors against the influence of the press; that the act of congress was binding on the courts and that authority to punish for contempt was restricted to a limited class of cases to which the one under consideration did not belong.

Probably the earliest case of contempt in the jurisdiction of the United States courts is that of Weiberg et al. v. The St. Oloff, in admiralty, decided in the district court of Pennsylvania in 1790, 2 Pet. Adm. 428; 29 Fed. Cases No. 17,357. Two Swedish seamen filed their libels seeking release from service under a cruel master. A citation was issued to the captain of the vessel, who refused to receive the writ on the ground that it would be an affront to his Majesty the King of Sweden for him to acknowledge a foreign jurisdiction with respect to the affairs of the vessel. The Swedish consul came before the court and stated the defense of the captain. He also claimed that by the treaty with Sweden the United States remitted such controversy as the present one to the Swedish consul. Thereupon the court directed the seamen to return to the vessel pending further consideration of the case. On their return to the ship the seamen were grossly maltreated by the captain. A motion was then made for an attachment against the captain for contempt of court in maltreating the seamen while their cause was pending. After a hearing the motion was sustained and the captain was thereupon put upon trial. He was convicted of contempt and fined $25.00 and ordered committed until the fine was paid. From the report of the case it does not appear that either the proctors or the court suggested the existence of the section of the judiciary act of 1789, authorizing the court to punish for contempt.

To Punish for Contempt is the Exercise of Judicial Power.

In punishing for contempt, the courts exercise a power which is within the constitutional protection of due process of law.

In Ex parte Doll, 7 Phila. 595, 7 Fed. Cas. No. 3968, Judge Cadwalader, in discharging a prisoner who had been by a United States commissioner committed for refusal to comply with an order of the commissioner to produce his books for examination, said that he doubted the power of congress to invest a commissioner with the authority in a proceeding originally instituted before him to summarily commit a citizen for an alleged contempt. This was an exercise of judicial power of the United States, which, under the constitution, could not be entrusted to an officer appointed and holding office, as the commissioners were appointed and held office.

In re Perkins, 29 Fed. Rep. 900, Judge Gresham discharged, on a writ of habeas corpus, parties who had been committed for contempt by a commissioner. The court held that the power to punish for contempt could not be exercised by a commissioner.

In re Mason, 43 Fed. Rep. 510, Judge Nelson, on a writ of habeas corpus, discharged a prisoner who had been committed by a commissioner for contempt in refusing to obey a writ of summons. In his opinion, Judge Nelson quotes Mr. Justice Miller in the case of Kilbourn v. Thompson, 103 U. S. 182, as follows: "The constitution declares that no person shall be deprived of his life, liberty or property.

without due process of law, and it has been repeatedly held by the United States supreme court that this means a trial in which the rights of the party shall be decided by a court of justice appointed by law and governed by the rules of law previously established."

In re Monroe, 46 Fed. Rep. 52, Judge Parker, on a writ of habeas corpus, held that a federal court had jurisdiction, under the constitution of the United States, to determine whether one held in prison for contempt committed against a state court, was deprived of his liberty without due process of law.

In Johnson Steel, etc., Co. v. North Branch, etc., Co., 48 Fed. Rep. 196, Judge Reed sustained an application made by a master for a rule against a witness to show cause why he should not be punished for contempt for refusing to answer certain questions submitted at an examination before the master. The rule was to be discharged only after the witness had answered the questions and paid the costs of the proceedings.

In Ex parte Young, 50 Fed. Rep. 526, Judge Key, on a writ of habeas corpus, reviewed the jurisdictional questions involved in the case of a divorced husband who, in disregard of the decree of divorce, removed his child to a point beyond the State, for which he was committed for contempt. Judge Key held that the prisoner was not confined without due process of law or in violation of the constitution of the United States.

In Carman v. Emerson, 71 Fed. Rep. 264, the circuit court of appeals for the eighth circuit held that one who

had been adjudged guilty of contempt for failing to obey a writ of subpoena could be punished for contempt notwithstanding he had a valid reason for failing to obey the writ. The question came up collaterally in an action for false imprisonment, in which the facts shown were that the plaintiff having been subpoenaed failed to state his lawful excuses for disregarding the writ and being cited for contempt was required to prove his exemption from the writ of subpoena. In so far as the opinion holds that the witness can be punished for contempt, despite his showing that he is exempt from service, the case seems to be contrary to the current of authority, and its practical effect would mean a conviction without trial, and to do this would deny to the accused the due process of law.

In Johnson v. Southern Building & Loan Assn., 99 Fed. Rep. 646, Judge Paul refused to sustain the action of a commissioner who held that a foreign receiver could not appear by counsel at an examination before the commissioner on the ground that the foreign receiver was in contempt in having failed to deliver certain papers. Judge Paul held that it was a judicial function to determine whether a party was in contempt, and that the power was not such as a commissioner could exercise.

In re Perkins, 100 Fed. Rep. 950, a commissioner had attempted to punish for contempt a deputy marshal who had failed to serve a warrant, and upon being admonished, had written an impudent note to the commissioner. Judge Purnell held that a commissioner was not a United States court, and that as the statute confined to courts the power

to punish for contempt, the acts of the commissioner were void. The commissioner should have reported the facts to the proper district court, which had authority to enforce obedience to its writs.

In Smith v. Belford, 106 Fed. Rep. 658, the circuit court of appeals for the sixth circuit sustained the right to resort to punishment for contempt as a coercive measure to require a bankrupt to deliver his assets to the trustee, but held that the power was a judicial power which could be exercised only by the district court and could not be exercised by a referee in bankruptcy.

In Ex parte Stricker, 109 Fed. Rep. 145, Judge Evans released on a writ of habeas corpus a Cincinnati lawyer who was imprisoned in the Kenton county, Kentucky, jail for contempt of a state court. The judge of the Kentucky court, being absent from his state, telegraphed his clerk an order of adjournment. Thereupon the Cincinnati lawyer, in the exercise of a statutory right, under the laws of Kentucky, demanded the selection of a special judge, which demand was not granted. Upon the return of the regular judge, and after he had convened court, he inquired as to the person who had demanded the special judge, and upon being informed by Stricker that it was he who had done so, the judge fined him $25, and ordered him committed till the fine was paid. Judge Evans on the writ of habeas corpus held that in contempt proceedings the accused was entitled to the protection of the constitutional guaranty that he should not be deprived of liberty without due process of law.

In Ex parte Davis, 112 Fed. Rep. 139, Judge Pardee, with Judges McCormick and Shelby concurring, held on a writ of habeas corpus that an attorney who had been sentenced to imprisonment for ten days, and to pay a fine of $100, should be discharged upon satisfying either the sentence or the fine, the statute authorizing punishment for contempt not permitting both fine and imprisonment.

In Ex parte Nugent, 1 Brunner Col. Cas. 296; 18 Fed. Cases No. 10,375, Judge Cranch of the circuit court of the District of Columbia on petition for a writ of habeas corpus, whereby Nugent sought his release from imprisonment under a commitment issued by the senate for contempt of that body, endeavored to sustain the right of congress to exercise powers similar to those exercised by parliament. He disregarded the limitation prescribed by the constitution, and while the case furnishes an interesting review of the English authorities, yet the principles it declares are no longer of consequence since the decision of this court in Kilbourn v. Thompson, 103 U. S. 168.

The Kilbourn case has been accorded distinguished consideration by the judiciary, some of the many instances being as follows: Cited and relied upon in In re Mason, 43 Fed. Rep. 516, holding commissioner of circuit court had no power to punish witness for failure to obey subpoena; Langenberg v. Decker, 131 Ind. 482, 16 L. R. A. 113, reviewing authorities, statute giving tax commissioners power to punish for contempt, invalid; People v. O'Brien, 111 N. Y. 58, 7 Am. St. Rep. 710, 2 L. R. A. 267, and note, statute providing for taking away its prop-

erty on dissolution of corporation, unconstitutional; Cross v. Brown, 19 R. I. 232, upholding provisions as to attachment by trustee process. Cited in State v. McLelland, 18 Neb. 240, 53 Am. Rep. 817, holding presiding officer's certificate merely prima facie evidence that bill passed house. Cited and relied upon in Smith v. Myers, 109 Ind. 7, 58 Am. Rep. 380, reviewing authorities, refusing to enjoin the delivery of election returns to speaker of house; Hovey v. Foster, 118 Ind. 508, holding court could not review facts passed on by legislature to determine validity of act; Lowe v. Summers, 69 Mo. App. 648, holding legislature might punish witness for refusal to answer questions of committee to investigate police commission; Ex parte Dalton, 44 Ohio St. 151, 153, 58 Am. Rep. 802, 804, where witness was punished for contempt of committee on privileges and elections. Approved in In re Pacific Ry. Commn., 12 Sawy. 576, 579, 596, 598, 32 Fed. Rep. 251, 254, 266, reviewing authorities, refusing to compel witness to testify, before commission, under act of March 3, 1887; Lester v. People, 150 Ill. 241, 41 Am. St. Rep. 382, holding court could not compel surrender of party's private books, etc., for indefinite period; Courtnay v. Knox, 31 Neb. 659, holding notary could not punish for contempt; dissenting opinion in Interstate Commerce Commn. v. Brimson, 155 U. S. 4, majority sustaining validity of twelfth section of interstate commerce act; Koehler v. Hill, 60 Iowa, 675, 699, arguendo; State v. Seaton, 61 Iowa 569, majority remanding prisoner committed by justice of peace. See note in 1 Am. St. Rep. 886. Dis-

tinguished in Interstate Commerce Commn. v. Brimson, 154 U. S. 478, 485, upholding twelfth section, interstate commerce act; In re Chapman, 166 U. S. 668, where witness was compelled by senate to testify as to whether its members had dealt in certain stocks; People v. Keeler, 99 N. Y. 476, 477, 484, 486, 52 Am. Rep. 54, 55, 60, 62, witness punished for refusal to testify before committee investigating charges against public officer. Cited and principle applied in United States v. Lee, 106 U. S. 220, allowing recovery of land seized under order of president for cemetery and fort; State v. Noble, 118 Ind. 352, 10 Am. St. Rep. 145, 4 L. R. A. 104, act providing for supreme court commissioners held unconstitutional; In re Sims, 54 Kan. 6, 45 Am. St. Rep. 263, 25 L. R. A. 112, act giving county attorney power to punish witness for contempt, invalid; Ex parte Ginnochio, 30 Tex. App. 590, act attempting to take away jurisdiction of court, conferred by constitution, invalid; dissenting opinion in State v. Hyde, 121 Ind. 44, majority holding act invalid as infringing executive's constitutional right to appoint certain officers; arguendo, in Tindal v. Wesley, 167 U. S. 217; dissenting opinion in Robertson v. State, 109 Ind. 94. See monograph in 13 Am. St. Rep. 139. Limited in Hovey v. State, 119 Ind. 401, holding power of appointment not vested exclusively in executive. In re Davis, 58 Kan. 381, holding statute did not give legislative committee power to punish witnesses for contempt; arguendo, in Jones v. Lamar, 34 Fed. Rep. 462; dissenting opinion in Koehler v. Hill, 60 Iowa 675, 699, and Purnell v. Mann (Ky.), 50

S. W. 266. See note in 74 Am. Dec. 681. People v. Sharp, 107 N. Y. 445, 1 Am. St. Rep. 857, where committee was appointed to investigate bribery charges; De Camp v. Archibald, 50 Ohio St. 626, 40 Am. St. Rep. 697, upholding notary's power to punish witness refusing to answer, in taking deposition. See note in 74 Am. Dec. 681.

But the limitations of the constitutions do not apply exclusively to congress. The same instrument that denies to our legislative body powers enjoyed by parliament also denies to our courts powers exercised by the courts of England. For this reason the English cases are likely to prove dangerous authorities in cases involving the liberties of a citizen. In a country where the people are subjects of the sovereign and the courts are an agency of the sovereign, exercising judicial powers of the sovereign over the subjects, the situation is essentially different from that which exists in a country where the people are not subjects but citizens; where the government is one "of the people, by the people and for the people;" where the courts exercise only such powers as are delegated to them by the citizens, and where the reserved powers of sovereignty repose in the citizens. (Munn. v. Illinois, 94 U. S. 113; Illinois Central R. Company v. Illinois, 146 U. S. 387). This court has held that the power of courts to punish for contempt was, under the limitations of the constitution, to be exercised only as authorized by the acts of congress. Ex parte Robinson, 19 Wall. 505; In re Chiles, 22 Wall. 157; In re Savin, Petitioner, 131 U. S. 267. It follows, of

course, that if the power to punish for contempt is only delegated to the courts it is not inherent in them. Some confusion appears in some of the cases because the *inherent* powers of the English courts have been invoked to illustrate the *implied* powers of the courts of the United States. The question is material here, and of vast importance, because it goes to the power of the circuit court, in this case to entertain jurisdiction of a civil controversy between two citizens of Illinois. Mr. Bessette claims that the United States circuit court for the district of Indiana had no jurisdiction of any cause of action which might arise between him and the W. B. Conkey company, so long as both were citizens and residents of Illinois and no federal question was asserted or involved. And Mr. Bessette further contends that if the circuit court had no authority to adjudicate his rights as against those of the appellee, then the court had no power to enforce as against the appellant by civil process the court's adjudication made in favor of the appelle. The power to execute the judgment ought not be greater than the power to render the judgment.

In United States v. New Bedford Bridge, 1 Woodb. & Minot 401; 27 Fed. Cases No. 15,867, Mr. Justice Woodbury held that the authority to punish for contempt was granted as a necessary incident in establishing a tribunal as a court; that the common law could not be resorted to for aid in giving jurisdiction to the courts of the United States, but only in deciding certain questions after jurisdiction had been otherwise obtained.

In Toledo, Ann Arbor, etc., R. Co. v. Pennsylvania Co. et al., 54 Fed. Rep. 730, Judge Taft passed upon a bill for an injunction against connecting lines of railroad, and against officers of the Brotherhood of Locomotive Engineers, who were charged with conspiring to boycott the Ann Arbor line, because of a strike on the part of its engineers. Judge Taft held that the jurisdiction of his court was determined by the federal question presented in the disturbance of interstate commerce, and that his court should entertain the suit, though there was not a diversity of citizenship. The bill as to one F. P. Sargent was dismissed, because he was a non-resident of Ohio, in which state the bill was filed.

The manner in which courts must proceed in order to retain the jurisdiction which their lawful writs authorize them to exercise in any given case has been so recently and learnedly set forth in Hovey v. Elliott, 167 U. S. 409, as that the citation here of other authorities would be useless.

In Sommerville v. French, 1 Cranch C. C. 474; 22 Fed. Cases No. 13,173, decided in 1807, the circuit court for the District of Columbia ordered an attachment for witnesses who had been subpoenaed. Their defense was that they resided in Maryland. But the court, finding that they resided within 100 miles of the place of holding the court, ordered the attachment to issue.

While the question of procedure in contempt cases is not directly involved in the certification of this cause, there

are nevertheless aspects of procedure which may be influential in determining whether the proceeding to review should have been by writ of error or appeal. The 90th rule of this court is as follows:

> "In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

The act of congress with relation to notice in case of injunctions is as follows:

> R. S., Sec. 638. "The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing any pleading, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, rules and other proceedings, preparatory to the hearing, upon their merits, of all causes pending therein. And any judge of a circuit court may, upon reasonable notice to the parties, make, and direct and award, at chambers or in the clerk's office, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, whenever the same are not grantable, of course, according to the rules and practice of the court."

The 47th and 48th rules are as follows:

47. "In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

48. "Where the parties on either side are very numerous, and can not, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases the decree shall be without prejudice to the rights and claims of all the absent parties."

The Aaron Burr trials conducted before Chief Justice Marshall and Judge Griffin of the district of Virginia in 1807 furnish the earliest construction of the law of contempt in obstructing the administration of justice. The person charged with contempt of court in obstructing the administration of justice was Brig.-Gen. Wilkinson of the United States army, the proceedings being a part of the many questions brought before the court in the trial of

Burr. The proceedings against Burr were commenced March 20, 1807, by bringing the prisoner before Chief Justice Marshall as a committing magistrate, for the preliminary examination. On the proofs then adduced the chief justice refused to hold Burr to answer to the charge of high treason, but committed him on a charge of misdemeanor in preparing and setting on foot a military expedition against the dominions or territory of a prince (the king of Spain) with whom the United States were at peace (Coomb's Trial of Aaron Burr 1; 4 Cranch 455; 25 Fed. Cases No. 14,692A). On May 25, 1807, the grand jury being then in session to consider the charges against Burr and his confederates, the attorney for the United States made a motion in open court to commit Mr. Burr on a charge of high treason, stating that additional evidence, not available at the former hearing would be presented. Objection being made to the power of the court to undertake a further investigation, particularly while the grand jury was in session, the matter was argued at length and on May 26th the court rendered an opinion sustaining its power in the premises. (Coomb's Trial of Aaron Burr 22; 35 Fed. Cases No. 14,692b.) Evidence was heard upon the motion at which hearing the court on May 28th, excluded, for want of proper authentication, the affidavit of Jacob Dunbaugh (Coomb's Trial Aaron Burr 29; 25 Fed. Cases No. 14,-692c). On June 9th Burr applied to the court for a writ of subpoena duces tecum to be directed to the President of the United States, requiring him to produce a certain letter and certain orders issued to the army and navy in

relation to Burr's expedition. This motion having been argued, the court held that the writ might issue. (Coomb's Trial Aaron Burr 37; 25 Fed. Cases No. 14,672d.) Afterward a witness called to prove the authenticity and materiality of a letter in cipher which the prosecution proposed to send to the grand jury, refused to testify on the ground of self-crimination. The question of the privilege of the witness was decided by the court June 18th. (Coomb's Trial Aaron Burr 67; 25 Fed. Cases No. 14,692e.) Subsequently a motion was made by the defendant to attach General Wilkinson for a contempt of court in obstructing the administration of justice and abusing the process of law by coercing and intimidating certain witnesses and procuring their depositions by unlawful means. The first controversy arose as to the form of the motion for an attachment against General Wilkinson. Counsel for the United States insisted upon a specification of the conduct for which the writ was to issue; that if generally expressed as a "contempt of the court" nothing but the spirit of divination could enable him to discern the specific offense charged against him nor prepare for his defense; that the precise circumstances which constituted the offense ought to be particularized. Mr. Burr and his counsel urged the delicacy of the matter as their excuse for not having in the face of their motion the affidavits of James Knox and Chandler Lindsley, in which it was charged that General Wilkinson at New Orleans had offered money to the witnesses to induce their withdrawal of objections to going without the jurisdiction of the court to testify; and upon

the refusal of witnesses to take the money in causing them to be arrested and removed from New Orleans to Virginia to testify as to Burr's expedition. Chief Justice Marshall held that the facts disclosed did not show the obstruction of the administration of justice. He held, also, that an obstruction of administration of justice would be punishable as contempt of court. The motion for an attachment was denied. (Coomb's Trial of Aaron Burr 72; 25 Fed. Cases No. 14,692f.) In 25 Fed. Cases, beginning at page 1, all the Aaron Burr cases are assembled, together with much historical matter relating to his conduct.

In United States v. Carter, 3 Cranch C. C. 423; 25 Fed. Cases No. 14,740, decided in 1829, two women who had been witnesses made affidavits that Louisa Carter, who had by their evidence been convicted, threatened one of the witnesses that "she would give her her dose and that she would be revenged of them both." The threat was made after the trial. The place was the plaza of the court house. Judge Thurston, considering it as a contempt in the presence of the court, it being within the possibility of the hearing of the court, ordered the attachment without a previous rule to show cause. The defendant being brought in upon an attachment and having upon interrogatories confessed the threats and repeated them in the face of the court and avowed her determination to carry them into effect, the court fined her $1.00, ordered her to give security for her good behavior in the sum of $100 and in default thereof committed her to prison.

In United States v. Caton, 1 Cranch C. C. 150; 25 Fed. Cases No. 14,758, it was held to be contempt for a witness to refuse to answer to grand jury and to threaten the jurors. The foreman of the grand jury made the complaint for an attachment which was issued. The facts were proven by the testimony of two of the grand jurors taken orally.

In United States v. Emerson, 4 Cranch C. C. 188; 25 Fed. Cases No. 15,050, decided in 1831, parties to a depending action applied epithets to each other and retired thence to the corridor, where they fought. Officials brought them before the court. Afterward, upon answers to interrogations, the parties were each fined for contempt of court, for misconduct "in the presence of the court or so near there as to obstruct the administration of justice."

In Vose v. Internal Improvement Fund, 2 Woods 647; 28 Fed. Cases No. 17,008, Mr. Justice Bradley denied a motion for an attachment sought against the trustees of the internal improvement fund of Florida who were charged with having violated an injunction in selling certain lands. The facts being established, the answers of the respondents denying any intention to violate the injunction were held sufficient.

In Wartman v. Wartman, Taney 362; 29 Fed. Cases No. 17,210, Chief Justice Taney, at the circuit, applied the proceeding by contempt as a coercive remedy to require a defaulting trustee to bring into court a fund which was being subjected to waste. A motion for an attachment was first made and notice issued therein. After a hearing the

motion was sustained and the respondent being put upon his answer was held guilty and committed until he should comply with the order of the court.

In Whipple v. Hutchinson, 4 Blatchf. 190; 29 Fed. Cases No. 17,517, Mr. Justice Nelson held that where on a motion for an attachment for the violation of an injunction there was doubt whether the writ was served on the defendant the motion would be denied; that the writ ought to contain a concise statement of the acts prohibited and ought not refer to the complaint for the things enjoined, otherwise it could not be the basis of an attachment against any person who had not been served with the bill. This case is cited with numerous others, in United States v. Anon., 21 Fed. Rep. 767, by Judge Hammond to the point that there is no rule in equity, though there is in law, that the defendant's answers to interrogations be taken as true.

In re May, 1 Fed. Rep. 737, where a juror conferred with a litigant, the court held that the accused could purge himself of the contempt, and if he did so falsely the government's remedy was an action for perjury.

In United States v. Anonymous, 21 Fed. Rep. 761, Judge Hammond reviews the authorities which treat of civil and criminal contempt. The right to purge for contempt is held to apply in actions at law. At equity the proceeding being remedial it is proper to hear evidence to determine the extent of the complainant's losses. In a case where the offenses consisted in disturbing the proceedings before a master the offense was held to be such that a fine in favor of the United States was entered.

In re Pitman, 1 Curt. 186. 19 Fed. Cases No. 11,184, decided in 1852, Mr. Justice Curtis construed the amendatory act of March 2, 1831, concerning contempt. He held that the act authorized a court to hear summarily a complaint against the clerk of the court charged with failure to pay the marshal's fees. In his opinion, the proceeding against the clerk was criminal and he should be allowed, in such case, to purge himself with his answers. In noting the distinction between such a case and a case in which the contempt preceeding was in the nature of a civil execution, the court said:

> "Now one of the most important privileges accorded by the law to one proceeded against as for a contempt, is the right to purge himself, if he can, by his own oath. So rigid is the common law as to this, that it does not allow the sworn answers of the respondent to be controverted, as to matter of fact by any other evidence. U. S. v. Dodge (Case No. 14,975). 'If the party can clear himself upon oath he is discharged.' 4 Bl. Comm. 286, 287. Whether this rigid rule would be applied to that class of these cases which Blackstone (4 Comm. 285) says 'is to be looked on rather as a civil execution for the benefit of the injured party' it is not necessary here to decide. There are certainly precedents for introduction of other kinds of proof. Kilpatrick v. Vandiver, 2 Rep. Const. Ct. 341; Summers v. Caldwell, 2 Nott & McC. 341; Taylor v. Howren, 1 McCord, 418; Daniel v. Capers, 4 McCord, 237; U. S. v. Mann (Case No. 15,716); Justice of Baldwin Co. v. Bivins, 6 Ga. 575."

In United States v. Dodge, 2 Gall. 313; 25 Fed. Cases No. 14,975, there was a process of attachment against the respondent for a contempt in forcibly rescuing a prisoner in the custody of the marshal, under an indictment for treason. The court held:

> "We can not receive any collateral evidence as to the offense, but if the respondent, by his affidavit, and answers on oath to interrogatories proposed by the district attorney, discharges himself of the contempt, no further proceedings can be had against him on the attachment. If, from any collateral evidence, it should appear that there is reason to believe the respondent has perjured himself, we will recognize him to answer, at the next term of the court, to such matters as may be found against him. See, as to contempts and practice thereon, Vin. Abr. 'Contempts,' A. B.; Prac. Reg. 99, 100; Gilb. Com. Pl. 20, 21; 12 Mod. 511; Mod. Ca. 73; Com. Dig. 'Chancery,' D, 3; Salk. 321; 4 Bl. Comm. 283; Rex. v. Horsley, 5 Term R. 362; 3 Hawk P. C. bk. 2, c. 22, 1, 32-34; 1 W. Bl. 640; B. Wyatt's Reg. 138; 2 Burrows, 796; Doug. 516; Bac. Abr. 'Attachment B.' B."

That Mr. Bessette was to be dealt with by the court according to the same procedure applied to the cases of the other corespondents is established by the authorities. In Durant v. Washington County, and in Riggs v. Johnson County, 1 Woolw. 377; 8 Fed. Cases No. 4191, Mr. Justice Miller considered several petitions for attachments issued against the various members of a court of supervisors

who were charged with disregard of a writ of mandamus requiring that taxes be levied to pay certain judgments. Mr. Justice Miller said:

> "We are of opinion that the cases of all the supervisors charged with contempt of one writ of mandamus are proper subjects for consolidation into one. The order which the supervisors were required to execute was one order; the action required of them was joint action; and it related to but one subject-matter. Their guilt or innocense of the charge of contempt has its foundation in the same duty and the same disobedience; and though there may be varying defenses or excuses, and a difference in the degree of guilt, the hearing together of these matters is quite as consistent and appropriate as the trial of the guilty and the innocent, charged in the same indictment with the vilest crime; or as the trial in one civil action of many persons charged as joint trespassers. The truth is, that, as a principle, they are jointly and severally guilty, and may be jointly and severally tried as convenience and the discretion of the court may determine. In the cases before us, we are of opinion that justice and convenience will be subserved by a consolidation of all which relate to the disobedience of the same writ of mandamus, and we shall order that they be thus consolidated."

In Fanshawe v. Tracy, 4 Biss. 490; 8 Fed. Cases No. 4643, Judge Drummond construed the ninetieth rule of this court and determined its application to the long-established manner of proceeding in contempt cases in the cir-

cuit court. He held that it was necessary to resort to a supplemental bill in order to bring before the court new parties whom it was desired to bind by the order or decree. He thought that the offense of contempt was not a specific criminal case, but that it partook "of the nature of a criminal offense."

In Gray v. Chicago, etc., R. Company, Woolw. 63; 10 Fed. Cases No. 5713, Mr. Justice Miller states the rule of practice in England to which the ninetieth rule of the court refers, and he discharged the respondents who were brought before him on a writ of attachment, holding that the writ was unlawfully issued. The ruling of Justice Miller is directly opposed by the ruling of Judge Drummond in Fanshawe v. Tracy, *supra*.

One of the earliest cases was Hollingsworth v. Duane, Wall. Sr. 77; 12 Fed Cases No. 6616 (see also Fed. Cases No. 6617), tried in the district of Pennsylvania in 1801 before Judges Tilghman and Griffith, in which it was held to be a criminal contempt for an editor while a cause was depending to publish a newspaper article attacking the character of the judges, jurors and parties to the action. The proper procedure was held to be the filing of an information or petition for a rule against the respondent to show cause why an attachment should not go against him, as for contempt in answer to which rule he might by affidavits controvert, explain or palliate; that he might raise any legal objections and might defend either in person or by counsel. Thereupon the court should determine whether it should discharge the rule or allow the

attachment to go. If the attachment be ordered, then the right of the respondent was either to submit his contempt without interrogatories or he might demand of the prosecutor to file interrogatories stating the questions upon which the contempt turned. Upon his answers under oath to these interrogatories the question of punishment was resolved.

In Ex parte Judson, 3 Blatchf. 89; 14 Fed. Cases No. 7561, Mr. Justice Nelson held that the proper practice was first to move for an attachment on which motion the party could be heard as to the sufficiency of the cause for attachment.

In re Judson, 3 Blatchf. 148; 14 Fed. Cases No. 7563, Judge Betts held that an attachment should not be granted unless the charge of contempt was clearly proven and that when the contempt was not committed in the presence of the court the charge must be proven by affidavit.

In Sickles v. Borden, 4 Blatchf. 14; 22 Fed. Cases No. 12,833, Judge Hall considered a motion for an attachment against the defendants for violation of an injunction. Notice of the motion for an attachment was served on the respondents with a copy of the affidavit. In opposing the motion the court permitted one of the respondents to show as a conclusive defense "that he was not in court when any injunction was ordered and that he had never been served with an order or injunction in the case or with any copy or notice of any such order or injunction." In disposing of the matter Judge Hall said:

> "If the injunction had been properly served on Allen, and had been directed to servants, agents, workmen and employes of the defendants, and had, in terms, restraining such servants, agents, workmen and employes, the very serious question would have been presented, whether persons not parties to the bill could be restrained, under such a general designation, by an injunction issued upon notice only to the parties to the suit. The act of congress requires notice of an application for an injunction; and I am very strongly inclined to the opinion, that, in order to attach for the breach of an injunction, the party to be proceeded against must be a party to the suit, and have had notice of the application for the injunction."

In United States v. Duane, Wall. Sr. 102; 25 Fed. Cases No. 14,997, tried in 1801, Judge Tilghman stated the facts and the law as follows:

> "A motion was made by the counsel for Levi Hollingsworth, for a rule to show cause why an attachment should not issue against you, grounded on an affidavit of your having made a publication in the newspaper called the Aurora, which was supposed to be a contempt of this court. You appeared in court, on the day appointed for showing cause, and when the prosecutor was about to offer evidence in support of the rule, you voluntarily declared that you confessed yourself the author of the publication in the Aurora. The counsel for the prosecutor were then heard in support of the rule, and

your counsel made an elaborate and ingenious argument against it. The court delivered their opinion yesterday, that you had been guilty of a contempt, and made the rule absolute. You were then informed, that if you wished to answer interrogatories, it was your right and your privilege to have them exhibited by the prosecutor; and that if, by your answer on oath, you cleared yourself of the contempt, it would be received as the truth, notwithstanding the evidence that had been produced against you, and you would be discharged from all further proceedings. You requested time to consider of it, which was granted you; and you have this day declared that you do not wish the interrogatories to be exhibited.

"In order to afford complete security, it is absolutely necessary to restrain and punish offenses of this kind in a summary manner, and in a summary manner they have been punished, from the earliest times to the present day. There is nothing contrary to this mode of proceeding in the constitution of the United States, though it declares that the trial of all crimes shall be by jury. By fair construction this is only to be intended of those crimes which by our former laws and customs had been tried by jury. This construction has been universally received by the courts of the United States, and by the courts of the several states, whose particular constitutions contain a similar provision."

In the proceedings in the case of United States v. Duane, questions as to contempt arose and were disposed of as shown under the titles of Hollingsworth v. Duane,

12 Fed. Cases Nos. 6616, 6617, 6618; United States v. Duane, 25 Fed. Cases No. 14,996 and in United States v. Wayne, 28 Fed. Cases No. 16,654.

THERE MUST BE PRIVITY OF INTEREST IN THE ACTORS IN CIVIL CONTEMPT.

In Dunks v. Grey, 3 Fed. Rep. 862, a father was held for the acts of his son in dealing in an article the sale of which had been enjoined.

In United States v. Memphis and Little Rock R. Co., 6 Fed. Rep. 237, the court punished employes of a railroad company who, in the name and right of their master, did acts in violation of an injunction.

In a note to In re Doolittle, 23 Fed. Rep. 544, Mr. Francis Wharton cites many cases to sustain his views, and says:

> "The first point that is to be discussed in connection with the foregoing opinion is that which is embodied in the following statement: 'Suppose a party of men—and I state this merely as an illustration—combine to commit an assault and battery upon one person, and, without intending so to injure, do, through mistake, actually seize and beat a third person. Although such beating was unintentional, perhaps accidental, yet, as they were engaged in an unlawful enterprise, it is just the same as though they intended that unlawful attack upon the person actually receiving the injury.

"The question which is here put, viewing it in its general relations, is one by which the courts have been frequently embarrassed. It is as old as the earliest opinions of Roman jurists. It comes to us as fresh in the cases of today as if it never had been before discussed. Is a man responsible for acts designed by him, but which were, nevertheless, not intended by him? The general rule, I apprehend, may be thus properly stated. When the act in question results as a natural and probable consequence of an intended wrongful act, then the unintended wrong derives its character from the wrong that was intended. So far as concerns questions of general malice this position can not be disputed. A man, for instance, from general malice, tears a rail off of a railway, or drops from a roof a very heavy substance on the pavement where a crowd is passing; and in such cases, if death ensues, he is responsible for murder, though he did not intend to take any one life in particular. This is also the rule in cases of special malice, when the object effected is incidental to the object intended. The same distinction has been accepted with regard to arson, where it is held that where the house of A is burned instead of that of B, as the felon intended, this is arson as much as if the intent had been to burn the house of A. In burglary, also, it is held to be no offense that the goods stolen were not those which the burglar intended to steal. Nor is it a defense to an indictment for stealing that the defendant's intent was not to steal from any particular owner, or that it was to steal from a person who turned out not to be the real owner.

"These conclusions may be sustained on principle. Whatever I ought to regard as incidental to an intended act, I must be regarded as having intended. It is no defense, if I shoot at A on the road and hit B, who happens to be behind A, that I did not actually see B in the spot where he was shot. It was my duty to have seen him, and I am responsible for the consequences. It is true, as I have endeavored elsewhere to show, that the proper way of apportioning the responsibility in such cases is by indicting the offender for shooting at A with intent to kill, and also for the negligent homicide of B. But, however this may be, that the offender in such a case is indictable for the injury that he ought to have seen, can not be questioned.

"The observations that have just been made are particularly applicable to cases of riots arising from the illegal assertion of supposed rights, or redress of supposed grievances. Parties engaging in such a riot are indictable for the natural and probable consequences of the riotous confederacy. If the plan involve a crime, then the offenders are responsible for such crime when committed in execution of the plan.

"The only qualification is that such an act must result from the confederacy. If it does not, the confederates not engaged in it can not be indicted for its commission.

"The rule is thus well stated by Judge Campbell in People v. Knapp [26 Mich. 112]. 'There can be no criminal responsibility for anything not fairly within the common enterprise, and which might be expected to happen if occasion should

arise for any one to do it.' In other words, the principle is quite analogous to that of agency, when the liability is measured by the express or implied authority. And the authorities are quite clear, and reasonable, which deny any liability for acts done in escaping, which are not within any joint purpose or combination. Hence it has been held that when several persons are engaged in committing a felony, and, on being detected, run different ways, upon which one of them, in order to get rid of a pursuer, assaults him, the others are not to be considered as indictable for the offense.

"The general rule is that the confederate is not responsible for the crime which is not a probable and natural consequence of the confederacy, unless such crime was committed with his assent. The question whether a party assaulting an officer in ignorance of the latter's official character is indictable for the aggravated offense, is one of greater difficulty. Undoubtedly we have statements made in such cases that if a man intends a wrongful assault, he is indictable for the distinctive offense of assaulting an officer, even though the assault was made in ignorance of the assaulted person's official rank. But there is something very unreasonable in this. A public officer, whether he be a sheriff, or a constable, or a receiver, appointed by a court having jurisdiction, ought to give notice of his position, if he desire to clothe himself with the immunities of that position, at least so far as concerns a prosecution for an assault on himself personally. It is the official person of the assaulted party that creates the offense in such a case. It is true that

if a statute should prescribe 'whoever assaults an officer, even without knowing the person assaulted to be an officer, shall be guilty of the aggravated offense,' etc., it would be no defense that the defendant was ignorant of the officer's official position. But at common law the scienter is necessary to constitute the offense, subject to the qualification that a party is supposed to know what he ought to have known. On the other hand, it is no defense to an indictment for obstructing an officer in his duties (the defendant knowing the officer's official position) that the object of the defendant was to personally chastise the officer, and not to obstruct him in the discharge of his duties. The obstruction was incidental to the intended assault, and therefore the defendant was indictable for the obstruction.

"When we come, however, to discuss the question of an attachment for a contempt, a new state of facts is presented. A court of equity is obliged to enforce its decrees; and if those decrees are disobeyed, the only process to compel obedience is by attachment. This is eminently the case with disobedience to an order of specific conveyance, with disobedience to orders of courts for payment, and with disobedience to an injunction. In such cases it makes no difference what was the intention of the party resisting the order of the court. Whether this resistance were intentional, or whether it were in knowledge of the existence of the decree resisted, or in ignorance thereof, makes no matter. An obstacle stands in the way of the execution of the court's decree, and that obstacle must be removed. Nor is it any defense in such case that the resist-

> ance is to a receiver whom the court appoints. The receiver is as much an officer of the court as is an officer appointed by the court to summon witnesses or to execute final process. Resistance in the first case is as much an obstruction of the process as is the resistance in the last two cases. It may be objected that this bears with unnecessary harshness on persons ignorantly impeding the action of the receivers in a case such as the present. The same objection, however, applies to all other cases of resistance of process; and if the objection were held good, no process whatever could be enforced against parties who are so stupid or so angry as not to understand what is the nature of the authority which they resist. The relief in all such cases is an appeal to the clemency of the court, which will permit no penalty greater than the merits of the case demand. But, whatever be the penalty, the process of the court must be obeyed."

In United States v. Alger, 62 Fed. Rep. 824, Judge Baker quashed an indictment against a striker because it failed to aver that the defendant was "one of the unknown parties that are referred to in the injunction" which the defendant was charged with having violated. The court said of the indictment:

> "It does not allege—and that is the most serious thing to my mind—that, either by his words or his acts, he was engaged in aiding the common object with other members of the American Railway Union. If what this man did was not done to give aid or comfort or encouragement to the object of

> arresting the mails, if it was an independent crime the man was committing, if he wanted to commit arson or robbery without having any connection with these men who were engaged in the interruption of commerce, then he would not be within the terms of the restraining order nor within the law which has been read here—the law of July 2, 1890."

In Hillmon v. Three Insurance Companies, 79 Fed. Rep. 749, Judge Foster refused to hold for contempt McNall, the superintendent of insurance in Kansas, who wrote a letter refusing to permit the companies to do business in Kansas, because they had not "dealt fairly with the plaintiff, Mrs. Hillmon, in refusing to pay the death loss, and in the litigation of the same, pertaining to her deceased husband." The action of Mrs. Hillmon against the insurance companies was pending in Judge Foster's court, at the time the insurance commissioner wrote the letter.

In Chisholm v. Caines, 121 Fed. Rep. 397, Judge Simonton denied that there need be any privity or community of interest between the parties. He held that a person might be guilty of contempt in doing an act which he knew other parties had been prohibited from doing, although the party accused was not a party to the suit and was neither an agent nor servant of men in privity with any of the parties. In such case he is not technically guilty of violation of the injunction, but of an independent act of disrespect of the court and disregard of the decree which constitutes contempt of the court and may be punished as

such without reference to its effect upon the rights of suitors. Judge Simonton reposes his argument on an English case and disregards the limitations which the statutes of the United States impose. Of course a suitor who is enjoined is first adjudged not to have the right which he was asserting. If he is enjoined from entering upon the premises of another it is because he is found by a judicial proceeding not to have in law the right of entry which he was asserting and about to exercise. If he was undertaking to enter without the assertions of a right, then he was criminal; his entry was criminal and courts of equity do not enjoin the commission of a crime. It follows that Judge Simonton's decision means that courts of chancery may punish as criminals those who without being bound to acquiesce in the ruling of the court, fail to respect it.

In Janney v. Pancoast, etc., Co., 124 Fed. Rep. 972, Judges Dallas and J. B. McPherson in a patent suit held that where an order had been made restraining acts of infringement the order was binding upon the persons who were then officers of the company whether they continued in the service of the defendant company or not. A person who was president of the defendant company when the order was entered was punished for contempt because after quitting the defendant company he manufactured the prohibited article on his personal account.

THE COURT SHOULD NOT EXTEND THE INJUNCTION IN CONTEMPT PROCEEDINGS.

In Onderdonk v. Fanning, 2 Fed. Rep. 568, the court refused to entertain proceedings to punish for contempt in a patent suit where the injunction was against the making and sale of one article and the article subsequently made and sold was colorably different.

In Steam Stone Cutter Company v. Windsor Mfg. Co., 3 Fed. Rep. 298, the court refused to entertain proceedings in contempt which proceeded on the theory that the constructive sequestration of property for the purpose of fixing a lien, was equal to an actual attachment of the property whereby it was in custodia legis at the time its possession was disturbed.

In Dinsmore v. L. N. A. & C. R. Co., 3 Fed. Rep. 593, Judge Gresham refused to punish for contempt in a case where it was doubtful whether the act done was such as had been enjoined.

In re Cary, 10 Fed. Rep. 622, the court denied a motion to attach for contempt attorneys of the assignee of a judgment who had sued out a writ of execution on the judgment after an injunction had been entered against the assignor of the judgment restraining him, his agents, servants and others from levying under a particular execution issued on the judgment before the assignment. The court held that the injunction being against the enforcement of the particular writ of execution could not be extended in contempt proceedings so as to constitute an order

against any and all proceedings to collect the judgment. [The editor of the Federal Reporter has appended to the report of this case a collection of cases on contempt.]

In Smith v. Halkyard, 19 Fed. Rep. 602, the court refused to commit the defendants because of a doubt as to whether the acts complained of were within the inhibition of the restraining order.

In Bate Refrigerating Co. v. Gillett et al., 24 Fed Rep. 696, Judge Nixon refused, on a petition for an attachment, to proceed against parties who had not received personal notice of the motion, though their violation of the injunction was apparent.

In Bate Refrigerating Company v. Gillett, 30 Fed. Rep. 685, Judge Wales refused, on a petition for attachment, to proceed against a corporation which pendente lite bought the property which, it was charged, was being used in the violation of an injunction. The court said: "An attachment for contempt is a summary proceeding, and the writ is granted only in cases which are free from any reasonable doubt on the law or facts. California Paving Co. v. Molitor, 113 U. S. 609."

In Temple Pump Co. v. Goss Pump, etc., Co., 31 Fed. Rep. 292, Judge Blodgett refused, in contempt proceedings, to extend the scope of an injunction, so as to make the specifications of a patent include something which was probably different from what the patent contemplated.

In Schlicht Heat, Light, etc., Co. v. Aeolipyle Co., 121 Fed. Rep. 137, Judge Lacombe held that in proceeding to punish for contempt for the violation of an injunction

doubtful questions were not to be resolved against the respondent.

In Creditors v. Cozzens, 6 Fed. Cases No. 3378, Judge Treat held that a restraining order prohibiting bankrupts from transferring their property did not extend to one who had become their assignee prior to the adjudication and that the transfer of the property by the assignee was not a contempt of court. The same rule was followed In re Moses, 17 Fed. Cases No. 9869, and In re Marter, 16 Fed. Cases No. 9143.

In re Judson, 3 Blatchf. 148; 14 Fed. Cases No. 7563, Judge Betts held that an attachment for contempt would not be granted unless a clear case of contempt was established.

In United States v. Kendall, 5 Cranch C. C. 385; 26 Fed. Cases No. 15,518, Judge Cranch refused to sustain a motion for an attachment against the postmaster-general who in complying with a writ of mandamus to pay certain awards had refused to pay interest on the awards. The writ of mandamus had made no direction as to the payment of interest.

THE NATURE OF CONTEMPT IN CIVIL CASES AND WHEREIN THE PROCEEDING IS A REMEDY FOR COMPENSATING THE INJURED PARTY.

In re Tift, 11 Fed. Rep. 463, decided in 1881, the court took an accounting of the losses resulting from an execution sale made under color of a judgment whose collection

had been enjoined, and fined the convicted parties a sum equal to their adversary's damages. The order was: "It is therefore considered and adjudged that a fine of $3,717.85 be and the same is imposed upon said Iron-clad Manufacturing Company for said misconduct, the same to be paid into the registry of this court within ten days from the date hereof, and to be thence paid over to said Tift or his attorney to satisfy said damages, costs and expenses."

In Searle v. Worden, 13 Fed. Rep. 716, decided in 1881, Mr. Justice Brown, then presiding in the circuit court for the eastern district of Michigan, ascertained the damages of the complaining party. After commenting on a statute of Michigan which authorized the court to indemnify the aggrieved party, and after holding that such a statute could not be applied in a federal court, he said: "But I notice that in several cases the federal courts have adopted an analogous practice and imposed a fine equivalent to the profits made by the defendants and the costs and expenses of the complainant and directed the same to be paid over to the latter by way of reimbursement. In re Mullee, 7 Blatchf. 23; Doubleday v. Sherman, 8 Blatchf. 45." An order was made in the cause requiring the party in contempt to pay his fine into the registry of the court, whence it was to be paid over to the complainant in satisfaction of his damages. This ruling was afterwards, on appeal, held to be an interlocutory order and reviewable on appeal. See Worden v. Searls, 121 U. S. 14.

In Mathews v. Spangerberg, 15 Fed. Rep. 813, decided

in 1883, it was held that when a party in the supposed exercise of his own rights violated an injunction, he should not receive a punitive fine, but should be required to compensate his adversary, and reference was made to a master to ascertain the complainant's damages.

In American Graphaphone Co. v. Walcutt et al., 86 Fed. Rep. 468, Judge Wheeler held the defendants guilty of contempt in violating an injunction which prohibited them from making, using and selling certain sound records. The defense was that the parties accused had been misled by the ambiguity of the order. Judge Wheeler considered the defense as a mitigating circumstance, but nevertheless made a reference to a master to ascertain the profits and damages arising out of the violation. These he ordered the defendants to pay within ten days after the damages should have been ascertained, or on default the defendants were to be committed.

In Economist Furnace Co. v. Wrought-iron Range Co. et al., 86 Fed. Rep. 1010, Judge Baker found that the accused were guilty of violating an injunction, and he fined them $500, "to be paid to the clerk of this court for the use of the complainant, together with the costs of this proceeding to be taxed."

In Indianapolis Water Co. v. American Strawboard Co., 75 Fed. Rep. 972, Judge Baker reviewed the authorities bearing upon contempt as a remedy and contempt as a vindictive or punitive proceeding. The case at bar was one wherein the strawboard company was charged with contempt in violating an injunction which prohibited it from

discharging its offal, or permitting the same to be discharged into White river, to the detriment of the water supply of the city of Indianapolis. Judge Baker said:

> "Counsel for defendants insist that whatever may be the doctrine of the English courts, and of the courts of the several states of the Union, it is settled by decisions of the supreme court that a proceeding whose object is the punishment of a party for the violation of an injunction is a criminal proceeding. In support of this doctrine, New Orleans v. Steamship Co., 20 Wall. 387; Ex parte Kearney, 7 Wheat. 39; Ex parte Robinson, 19 Wall. 505, among others, are cited, and the following statement from the first of these cases is quoted:
>
> " 'Contempt of court is a specific criminal offense. The imposition of a fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment on an indictment for perjury committed in a deposition read at the hearing.'
>
> "A comparison of these decisions with later ones by the same court will show that the principle contended for is inapplicable to the present case. The case of Ex parte Kearney, supra, was an application to the supreme court for a writ of habeas corpus, where a person was imprisoned by the circuit court for the District of Columbia for a contempt in refusing, as a witness, to answer a question on the trial of an indictment. The application was denied on the ground that the contempt was a criminal offense, and that the court had no appellate jurisdiction in such cases. The case of New Orleans v. Steamship Co., supra, was one

where, in a suit in equity, a circuit court of the United States imposed a fine on a defendant for obtaining, during the pendency of the suit, from a state court, an injunction against the plaintiff as to a matter within the scope of the litigation pending in the federal court. It was said that the proceeding in the state court was unnecessary, unwarranted in law, and grossly disrespectful to the circuit court. The court held that the contempt proceedings were for a criminal offense, and that it had no appellate jurisdiction, for that reason. The case of Ex parte Robinson, supra, was a petition for a mandamus to the judge of the district court for the western district of Arkansas to show cause why he should not be required to vacate an order disbarring the petitioner as an attorney, which disbarment had been adjudged as a punishment for a contempt of court committed in its presence, while sitting judicially. The court held that the contempt was a criminal offense, but the writ was awarded, nevertheless, on the ground that the punishment was unauthorized, and hence the order of disbarment void. In all of these cases the contempts affected the due and orderly administration of justice, and were offenses against public right, which was sought to be vindicated by their punishment. The primary purpose of the proceedings was to punish offenses against the public, represented by its courts. No private interests were directly affected or assailed by these contempts. The later case of Worden v. Searls, 121 U. S. 14, was a suit in equity on a patent, in which, a preliminary injunction having been granted and violated, the circuit court, in proceedings

and by two orders entitled in the suit, found the defendants guilty of contempt, and by one order directed that they pay to the plaintiff $250 'as a fine for said violation,' and the costs of the proceeding, and stand committed till payment; and by the other order directed that the defendants pay a fine of $1,182 to the clerk, to be paid over by him to the plaintiff, 'for damages and costs,' and stand committed till payment,—the $1,182 being made up of $682 profits made by the infringement, and $500 expenses of the plaintiff in the contempt proceeding. On appeal it was insisted that the suppreme court could not review the action of the circuit court in punishing a contempt committed by a violation of the injunction: (1) Because the proceedings were criminal in their character; (2) because the action of the circuit court is, by section 725 of the revised statutes, expressly made discretionary. Both of these contentions were rejected, and the jurisdiction of the court was asserted on the ground that the fines were incidents of the plaintiff's suit, and his right to them was founded on his right to the injunction. And it was further held that the action of the court was not discretionary, in such a sense as to make its order unreviewable. Section 725 of the Revised Statutes of the United States declares that the courts of the United States shall have power to punish, by fine or imprisonment, for contempts of their authority. And among the cases specially enumerated are:

" 'Disobedience or resistance by any officer of the court, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree, or command of said courts.'

"Such has always been the power of the courts, both at common law and in equity; and as was said In re Chiles, 22 Wall. 157, 168:

" 'The exercise of this power has a two-fold aspect, namely: First, the proper punishment of the guilty party for his disrespect to the court, or its order; and, second, to compel his performance of some act or duty required of him by the court, which he refuses to perform. Stimson v. Putnam, 41 Vt. 238. In the former case, the court must judge for itself the nature and extent of the punishment, with reference to the gravity of the offense. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power to do it.'

"The doctrine deducible from the former class of cases is that, when the contempt proceedings are prosecuted to vindicate a public right, they are criminal offenses, in which the intent is a material and necessary ingredient. Where, however, the proceedings are prosecuted either solely or primarily to enforce and vindicate private rights, which have been secured from violation by an interlocutory or final decree of the court, they are not criminal, but are civil, and remedial in their nature. As was said by Lord Justice Knight-Bruce in Spokes v. Banbury Board of Health, L. R. 1 Eq. 42, same case on appeal 11 Jur. (N. S.) 1011, where the breach of the injunction affects private rights the remedy by proceedings for contempt is a matter of course, due to the complainant by the law of the land, as the means of enforcing

the order. It is quite plain that the complainant can not be protected.

"The remaining question is as to the remedy to to be awarded to the complainant. Where the contempt consists in violating an injunction granted for the protection of the property rights of the complainant, it is said by the supreme court (In Re Chiles, 22 Wall. 157, 158) that the proper punishment is fine or imprisonment until the offending party performs the act required of him, or shows that it is incapable of performance. The only way in which the defendant could, with absolute certainty, keep the refuse of its mill from escaping into the river, would be by ceasing to operate the same. The circumstances here do not seem to me, at this time, to require the infliction of a punishment which would stop the operation of the mill. It is said to be the duty of the court, and within its power, and in accordance with its practice, to commit the offending party to the custody of the marshal until such offending party shall compensate the injured party for the damage sustained by the breach of the injunction. In my judgment, the court has the power to commit the offending party until he shall make compensation to the injured party, in a case where the damages caused by a breach of the injunction are capable of liquidation according to the practice of the court. In the present case, however, the damages are unliquidated, and difficult of ascertainment, and ought not to be settled except by the intervention of a jury. I must therefore decline to ascertain them in this proceeding. It may be that the court would have the power to require the defendant to give security

for the payment of damages to be ascertained by the verdict of a jury. But this case does not seem to call for the exercise of any such power, as the defendant and its general manager are amply able to respond in damages for any injury suffered by the complainant. The breach of the injunction arose from the negligence, and not from the wilfulness, of the defendant and its officers; and it was not known by them that, by negligently suffering or permitting the refuse of the mill to escape into the river, they would be regarded as in contempt for violating the injunction heretofore granted. In view of these facts, it seems to me that the court ought to impose a moderate fine only. As the complainant was fully justified in moving against the defendant and its general manager, it is entitled to costs, with a moderate allowance for its solicitors' fees. Dias v. Mere, 2 Paige 494.

"An order may be prepared, adjudging the American Strawboard Company and C. D. Macy, its general manager, guilty of contempt in disobeying the injunction heretofore granted, and assessing a fine against them of $250, to be paid to the clerk of the court for the use of the complainant, together with the costs of this proceeding, to be taxed."

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, Judge Lowell exhaustively reviewed the authorities and various statutes pertaining to the power to punish for contempt. He held that in chancery the proceeding was purely remedial; that a fine imposed, being a private remedy granted to a civil suitor was not within the pardoning power of

the president; that the order was interlocutory and not subject to that provision of the statute which prohibited a court from vacating a judgment—a rule which would apply if the proceeding were criminal—after the term, and that the prisoner might be discharged under the poor debtor statutes of Massachusetts.

In Wells, etc., Co. v. Oregon, etc., Co., 19 Fed. Rep. 20, the defendant and its general manager were adjudged guilty of contempt for violating an injunction. The court made a reference to a master to ascertain the complainant's losses, with the observation—

> "But as this is a proceeding between the parties to the suit, having a remedial purpose rather than a punitive one, the matter will now be referred to the master to ascertain what loss, expense or injury the plaintiff has sustained by reason of the misconduct of the defendant, with a view of enabling the court to impose, by way of punishment, a corresponding penalty on the defendant for the benefit of the plaintiff and as to any further proceeding the matter is continued until the coming in of the master's report. Craig v. Fisher, supra; Fisher v. Hayes, 6 Fed. Rep. 63; Macauley v. White S. M. Co., 9 Fed. Rep. 698; In re Mullee, 7 Blatchf. 23."

In Mallory, etc., Co. v. Fox, 20 Fed. Rep. 409, Judge Wallace held that he was restrained by the laws of New York from committing for contempt one who failed to perform an order to pay money.

In Roemer v. Neumann, 23 Fed. Rep. 447, Judge Wallace held that proceedings for contempt were so far remedial as that the complainant could select either of three remedies for relief, viz.: He could proceed by contempt, or at law, or in equity.

In Woodruff v. North Bloomfield Gravel Mining Co. et al., 27 Fed. Rep. 795, Judge Sawyer held the gravel mining company for contempt in violating an injunction which prohibited the flooding of other mines and imposed a fine of fifteen hundred dollars, to be paid to the complainant or its solicitors for their compensation in part for large expenses incurred in procuring evidence and prosecuting this proceeding for contempt.

In Spill v. Celluloid Manufacturing Co., 28 Fed. Rep. 870, Judge Wheeler allowed as costs in the main suit the fees of an examiner whose services were required under a reference in contempt proceedings, though the court held that the costs were not taxable under rules in equity as are the costs of depositions for the final hearing.

In re Graves, 29 Fed. Rep. 60, it was sought to order the arrest and removal of Graves from Iowa to Illinois, there to answer in proceedings for contempt of court. It became necessary to ascertain whether the contempt in that particular case was civil or criminal. Graves had been ordered in a civil suit to pay over certain moneys. He refused to comply with the order. Judge Shiras held that the proceeding was for the enforcement of a civil remedy against Graves and that a federal court was without power to require a party to go from one judicial cir-

cuit to another for the purpose of having civil proceedings taken against him, though it could require his arrest and removal if charged with a crime.

In the President ex rel. Moran et al. v. Mayor, etc., of Elizabeth, 40 Fed. Rep. 799, a citation for contempt was directed against the common council of Elizabeth, N. J., to compel obedience to a writ of mandamus which required that taxes be levied to pay a judgment. The court holds that the proceeding is remedial, and he reviews other remedies which were available under the laws of New Jersey, but which are not so efficacious.

In United States v. Taylor, 44 Fed. Rep. 2, on a rule to show cause, Judge Hanford held that a judgment of a territorial court, after the territory became a state, was transferred to the United States Circuit Court, by which the judgment should be enforced by execution, or by contempt proceedings, as the nature of the cause might require.

In Woodruff v. North Bloomfield Gravel Mining Co., 45 Fed. Rep. 129, Judge Hawley made a reference to a master under a petition to attach for contempt certain parties charged with having violated an injunction, and he sustained the master's finding that the facts did not constitute a contempt.

In American Const. Co. v. Jacksonville, etc., R. Co., 52 Fed. Rep. 937, a receiver had been appointed to take possession of the defendant's property, and a restraining order had been entered prohibiting administrative acts by the officers of the defendant. The officers of the company vio-

lated the injunction, and defied the authority of the receiver. The case presents a rare instance of both civil and criminal contempt—civil contempt in the transgression upon the adjudicated rights of the plaintiff, and criminal contempt in defying the officers and process of the court. In determining the question of procedure, Swayne, District Judge, proceeded as if the case were one of criminal contempt.

In re Copenhaver, 54 Fed. Rep. 660, Judge Philips, on a writ of habeas corpus, outlined the history of the rule which allows the federal judiciary to imprison for contempt the proper officers of a municipal corporation who refuse to levy taxes to pay a judgment. It appears from the opinion that St. Clair county, Missouri, was a proper defendant in a United States circuit court, that a writ of mandamus had been obtained by the judgment plaintiff directing that taxes be levied to pay the judgment; that Copenhaver and others were county judges, and as such were the proper officers to make the required levy; that in disregard of the writ of mandamus, they refused to make the levy; that they were cited for contempt and an order of commitment issued against them, committing them to jail until such time as they should consent to make the levy; that without repentance, Copenhaver and others sued out the writ of habeas corpus, seeking their discharge on the ground that their convictions were void. With respect to contempt as a remedy Judge Philips said:

> "This application involves the authority of this court to imprison judges of the state county courts

for refusal to obey the writ of mandamus. It is sufficient to say that this has now been the settled practice, established by decisions of the supreme court of the United States for over 30 years. It is a question which has called forth the best efforts of the ablest lawyers of the republic in its discussion, and on which has been expended a vast wealth of legal and judicial learning. It recieved its quietus in the cause celebre of Riggs v. Johnson Co., 6 Wall. 166. There was nothing political or revolutionary in the history of the establishment of this rule of practice in the federal courts. It was affirmed in a unanimous opinion by the supreme court, presided over by Chief Justice Taney, in 1860, in Knox Co. v. Aspinwall, 24 How. 376; and the final settlement of the question was an able opinion written by Mr. Justice Clifford, and concurred in by Mr. Justice Field, and others; Justice Miller dissenting with characteristic energy and ability. The doctrine sprang from the necessities of the case. As no law authorized the issue of an execution in the instance of a judgment in the United States court against a municipality, directly against the property of a constituent member of the corporation, the writ of mandamus was, ex necessitate, resorted to as the equivalent of an execution, to require the local agency of the state to make the levy as provided by the state statute for raising revenue to cover liabilities of the municipal government; otherwise the federal judiciary would present the anomaly of being provided for in the organic law of the federal government, with unquestionable power and jurisdiction to proceed to judgment in an action by a nonresident citizen

against the county or other municipal organization, and yet without power to execute judgment. As expressed tersely by the supreme court: 'No court having proper jurisdiction and process to compel the satisfaction of its own judgments can be justified in turning its suitors over to another tribunal to obtain justice.' In other words, it would seem to be a travesty of justice that, after conferring on the United States court jurisdiction to render judgment (as congress had the unquestioned right to do), the judgment suitor, as the opposers of the doctrine in question contended, should be turned out to pursue his remedy by another suit on his judgment in the state court. It is not necessary for me to say at this late day in the history of this matter what other remedy congress might have provided to mitigate any supposed evils of the practice in vogue; or what substitute might now be made with justice to both creditor and debtor. But it is proper to say that, unless congress shall wholly strip the courts of the United States of jurisdiction over controversies between citizens of different states whenever a municipality is concerned, it were madness to suppose it, or the federal courts, will ever deny the remedy by mandamus, until some other remedy, equally, if not more, efficacious, is provided."

Judge Philips having been of counsel in the cases which led to the rendition of the original judgment, his opinion presents an instructive array of facts and law bearing upon the principle that contempt proceedings in such cases are purely remedial.

In Toledo, Ann Arbor, etc., Ry. Co. v. Pennsylvania Co. et al., 54 Fed. Rep. 730, Judge Taft reviewed the attitude of the Brotherhood of Locomotive Engineers toward interstate commerce as demonstrated in their effort to boycott a connecting railroad which was in trouble with its employes. The court held that relief could be granted in a court of equity, and made an interesting differentiation of the acts of the engineers with respect to the rights of the complainant: "First in the light of the criminal law; second, with reference to their character as civil wrongs; and third, with reference to the remedies which a court of equity may afford against them." The question came before Judge Taft on a motion to enter, not to vindicate a temporary injunction.

In A. B. Dick Co. v. Henry, 88 Fed. Rep. 80, Judge Lacombe met a distressful situation by imposing a sentence of two days in jail, upon a defendant, who, a second time, violated an injunction in a patent case. The defendant appeared to the contempt proceedings without counsel, and with the sole defense that he was too poor to compensate the plaintiff for the losses it had sustained by reason of his transgressions.

In Rodgers v. Pitt, 89 Fed. Rep. 424, Judge Hawley imposed a penalty of the payment of costs upon a defendant, who, after an injunction against him in a case concerning irrigation, acquired new rights separate and distinct from those assailed by the complaint. The defendant claimed that his newly acquired rights were prior to those of the complainant, and that he had proceeded in

the exercise of his new rights not with the intent of thwarting the order of the court, but for the purpose of having a judicial determination of the rights he had acquired.

In Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Company, 92 Fed. Rep. 774, as punishment for contempt, Judge Philips dismissed a complainant's bill and dissolved a temporary restraining order because the complainant, after the order had been entered, published in the newspapers a perverted construction of the purpose and effect of the injunction.

In United States v. Sweeney et al., 95 Fed. Rep. 434, Judge Rogers goes at length into the remedial nature of contempt in a case against mine workers, and concluded by committing to jail various accused parties, their several terms of imprisonment ranging from ten months down to five months. Judge Rogers seemed to think that the Debs case was controlling, and that a civil suitor would be entitled to the same redress against one who transgressed private rights, as that which the law gave to the United States against those who transgressed the law. Of course the mere punishment of an adversary party can not be compensation to an injured complainant, and if the rule as followed by Judge Rogers were to prevail, the compensatory remedy to suitors furnished by proceedings to punish as for contempt would be rendered nugatory.

In re Reese, 98 Fed. Rep. 984, Judge Thayer, in discharging Reese on a writ of habeas corpus from imprisonment, imposed as a penalty for the violation of an injunction, said:

"It will be readily conceded that, in many contempt proceedings instituted in the federal courts, neither the citizenship of the accused, nor the fact that he is not a party to any case pending in the court whose authority has been set at naught, is of any importance. This is true when a federal court undertakes to punish one who either interferes with its proceedings, obstructs the due execution of its process, or intermeddles with property in its custody. A different rule, however, applies to cases like the one in hand, where the aid of a court of equity is invoked by a private suitor to restrain another from doing a threatened act which is alleged to be wrongful, on the ground that the legal remedy to redress the wrong is inadequate, and complaint is made that a restraining order entered in the case has been disobeyed. In such cases, the order of the chancellor, when made, prohibiting a given act or series of acts, becomes a special law for the governance of the parties to the cause, and such other persons, if there be any, who may assume to do the forbidden act or acts, not in the exercise of an independent right, but merely as the servants or attorneys of those who are named as parties and are expressly enjoined. Chancellor Kent said in Fellows v. Fellows, 4 Johns. Ch. 25: 'I have no conception that it is competent to this court to hold a man bound by an injunction who is not a party in the cause, for the purpose of the cause.' And the same doctrine has been enunciated in other cases. Iveson v. Harris, 7 Ves. 256; Schalk v. Schmidt, 14 N. J. Eq. 268; Boyd v. State, 19 Neb. 128, 26 N. W. 925; Robertson v. Tapscott's Adm'r, 81 Va. 533, 549; Watson v. Fuller, 9 How.

Prac. R. 425. See, also, State v. Anderson, 5 Kan. 90; Land Co. v. Elkins, 22 Blatchf. 203, 20 Fed. 545; Vanzandt v. Mining Co., 2 McCrary 642, 48 Fed. 770; 2 Joyce, Inj., p. 1327.

"In accordance with this doctrine, it is the usual practice, when an injunction issues against a corporation or an individual, to restrain the commission of an alleged tort, to prohibit, not only the defendant, but also his servants, employes, and attorneys, from doing the threatened act, and to hold the latter bound by the order, if, with knowledge of its existence, they do that which is forbidden, not in the exercise of an independent right, but in behalf of their principal. People v. Sturtevant, 9 N. Y. 264; People v. Compton, 1 Duer 512, 554; State v. Cutler, 13 Kan. 131; Atlantic & P. Tel. Co. v. Baltimore & O. R. Co., 46 N. Y. Super. Ct. 337, 416, 417; Phillips v. Detroit, 19 Fed. Cas. 512. Expressions are found in some cases, notably in Lennon v. Railway Co., 22 U. S. App. 561, 568, 12 C. C. A. 134, 64 Fed. 320 (although in that case the court was dealing with one who was merely a servant of the party who was enjoined), which give some color to the view that an order enjoining a defendant from doing an act alleged to be tortious binds all other persons not parties to the suit who have knowledge of the order, if they are acting in concert with him, although each claims an individual right to do the thing prohibited, and does not act as the servant or attorney of him who is specifically enjoined. The court is aware of no case, however, and none has been called to its attention, where the proposition last stated, that an injunction of the kind

last mentioned binds every one who has notice of it, has passed into judgment on a state of facts involving its determination, and, in the absence of controlling authority, the principle does not seem to be one which should receive judicial sanction. It is obvious that, if a person may be restrained from doing an act which he claims an individual right to do that is not derivative, without his being made a party to the cause, either by words of specific or general description, then he may be condemned unheard, and deprived of an asserted right without due process of law. The power of a chancellor does not extend to such limits, nor is there any necessity that it should do so."

In re Reese, 107 Fed. Rep. 942, the circuit court of appeals for the eighth circuit was required on appeal to review the action of Judge Thayer (98 Fed. Rep. 984) in releasing Reese on a writ of habeas corpus. The action of Judge Thayer was affirmed by the circuit court of appeals in an opinion which differentiates the cases. The opinion is too long to be reproduced here, and like the letters of St. Luke, it is so well done that it would only be marred by a condensation, and this though the effect of the opinion may be tersely stated.

In Callanan v. Friedman, 101 Fed. Rep. 321, Judge Lacombe held that a decree entered on default was entitled to respectful obedience, and for the flagrant violation of such a decree, in a patent case, the court imposed a fine of $300 which he divided, one-third to the United States and two-thirds to the complainant.

In Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. Rep. 873, the circuit court of appeals for the second circuit entertained a writ of error to revise a judgment in contempt in a cause where a judgment defendant had been adjudged guilty and fined $2,000 for violating an injunction, which amount was equally divided between the complainant and the United States. As to that part of the judgment which was remedial, the circuit court of appeals said:

> "The part of the judgment of the circuit court which directed a payment by the clerk to the complainant of one-half of the fine is objected to. The power of the circuit court to direct the payment of a part or all of the fine to the complainant in an application for contempt, as a compensation for his time and outlay in prosecuting the application, has been often recognized in the circuit courts, especially in this circuit; and in practice is a power which ought to be exercised when the expenses and trouble to which the complainant has been subjected justify its exercise. In re Mullee, 7 Blatchf. 23, Fed. Cas. No. 9,911; Macaulay v. Machine Co. (C. C.), 9 Fed. 698; In re Tift (D. C.), 11 Fed. 463; In re North Bloomfield Gravel Min. Co. (C. C.), 27 Fed. 795; Wells, Fargo & Co. v. Oregon Ry. & Nav. Co. (C. C.), 19 Fed. 20."

In Royal Trust Company v. Washburn, Bayfield & Iron River Railway Company, 113 Fed. Rep. 531, proceedings to punish for contempt arose out of an effort on the part of the state of Wisconsin and certain of its citizens to prevent the receiver appointed by Judge Bunn from de-

molishing the tracks of the railroad which he was ordered to do by the United States court upon its being ascertained that the road could not be operated by the receiver, except at a loss. Judge Jenkins entertained the proceedings to punish for contempt as a part of the suit in chancery. The point does not, however, appear to have been presented to the court that resistance to the efforts of a receiver to enforce an order of his court is a crime against the administration of justice, and as such is punishable as a criminal contempt. Judge Jenkins held that the various parties charged were guilty of contempt, and he fined some of them $250 each, while others he sentenced to imprisonment for sixty days. As a member of the bar of the circuit court of appeals for the seventh circuit I have learned that these contempt cases are now pending in the circuit court of appeals, on writs of error. It appears to be the understanding of the parties to those proceedings that nothing therein will be done until the supreme court shall have disposed of the questions certified to it in Bessette's case.

In Matheson v. Hanna-Schoellkopf Company, 122 Fed. Rep. 836, Judge J. B. McPherson refused to entertain a petition for contempt, because the petitioner, having knowledge of the alleged transgression of his rights, had waited four years before making any complaint.

In Chicago Directory Company v. United States Directory Company, 123 Fed. Rep. 194, Judge Lacombe equally divided as between the complainant and the United States two fines of one thousand dollars ($1,000.00) im-

posed for the violation of an injunction in a copyright case.

In re Fortunato, 123 Fed. Rep. 622, Judge Holt punished for contempt certain lawyers who, in disregard of an injunction in bankruptcy, caused a state court to punish the bankrupt for a contempt of its authority committed before the proceedings in bankruptcy. The contempt proceedings in the federal court were punitive, but Judge Holt held that the contempt proceedings in the state court were purely remedial.

In Dowagiac Manufacturing Company v. Minnesota, etc., Company, 124 Fed. Rep. 736, Judge Lochren expressed the views that contempt proceedings were in all cases criminal. He was not advised of any authority whereby the proceeding could be regarded as remedial for the purpose of compensating the party who had experienced losses by his adversary's transgressions.

In re Atkinson, 2 Fed. Cases No. 606, Judge McCandless held that the provisions authorizing a court of bankruptcy to restrain proceedings in a state court were remedial and as well for the protection of the creditors as of the bankrupt.

In Sparkman v. Higgins, 2 Blatchf. 29; 22 Fed. Cases No. 13,209, Judge Betts denied a motion for an attachment against parties charged with the violation of an injunction. There was no controversy about the injunction having been violated, and, if the question were one of maintaining the dignity of the court the offense had been committed. But the proceeding being remedial and it ap-

pearing that the plaintiffs had resorted to stratagem to induce a violation of the injunction, the court not only denied the complainants the relief they sought but taxed them with the costs of the proceeding.

In United States v. Beard, 24 Fed. Cases No. 14,551a, the court in admiralty fined respondents who had removed a vessel in defiance of the process of the court. The fine was both punitive and remedial, $500.00 being assessed in favor of the United States, $302.88 in favor of the relator.

In Wartman v. Wartman, Taney 362, 29 Fed. Cases No. 17,210, Chief Justice Taney, at the circuit, applied the proceeding by contempt as a coercive remedy to require a defaulting trustee to bring into court a fund which was being subjected to waste.

In Wetherill v. New Jersey Zinc Company, 1 Ban. & Arden 105, 29 Fed. Cases No. 17,463, Judge McKennan considered the rights of parties on a motion to attach for contempt after a final decree entered in a suit charging the infringement of certain patents. The court said:

> "The affidavits presented in support of this motion fully sustain the alleged violation of the injunction. This is controverted by counter affidavits, and hence it is urged that the motion should be denied, and the question of infringement involved, investigated and determined upon a new bill.
>
> "It is certainly desirable that any adjudication by the court, touching interests of such magnitude as are involved in this proceeding, should be in

such form that it may be susceptible of revision by a superior tribunal. But that is no sufficient reason for withholding from a litigant the benefit of a remedy to which he is entitled, if he establishes a meritorious claim to it, nor would it justify the court in abdicating the discharge of a duty which the law imposes upon it. Not only has a party, in whose favor judicial process has been awarded, right to demand the full measure of protection it was intended to afford him, but, in a more general sense, it is essential to the due administration of justice, that obedience to it should be enforced. If its requirements are wilfully unheeded, a summary method of correction is imperative; on the other hand, if the delinquency, either as to its character or the fact of its commission, is doubtful upon the proofs, such mode of interposition ought not to be applied. This is the import of all the authorities. It is not enough, therefore, to arrest a summary exercise of the power of the court, that the proofs of the violation of its decree are conflicting, or that the thing used by the respondent is, in some of its features, different from the thing whose use is interdicted. The evidence must be carefully weighed, and as it establishes clearly or falls short of establishing a substantial transgression, it is the duty of the court to act or forbear to act accordingly."

In Newport Light Co. v. Newport, 151 U. S. 527, this court gave consideration to the nature of a proceeding to punish for contempt and held it to be remedial, having the qualities of an execution of the decree. Speaking by Mr. Justice Jackson the court said, at page 539:

"In McMicken v. Perin, 20 How. 133, the plaintiff in error was attached for contempt in refusing to make a conveyance after a tender and deposit of money in court had been made in compliance with a mandate of this court. He appealed to this court, and it was held that the proceedings in contempt involved no new question or decision, but were the ordinary means of enforcing the original decree, and in no sense was it a final decree upon which an appeal could be sustained. It was, in effect, the same as ordering an execution on a judgment of law which had been affirmed on error and remanded for execution to the circuit court."

FURTHER AS TO THE NATURE OF CONTEMPT IN CIVIL CASES AND WHEREIN THE PROCEEDING IS A REMEDY TO REQUIRE OBEDIENCE BY COERCION.

In United States v. Sowles, 16 Fed. Rep. 536, the proceeding was coercive to require a bankrupt to deliver up his assets. The order was that he be committed until compliance. The cases are reviewed, showing the antiquity of this attribute of courts.

In Norris v. Hassler, 23 Fed. Rep. 581, a defendant who refused to obey a writ of subpoena ducas tecum was found guilty of contempt, but judgment was suspended, the court saying: "As the object of the proceeding is to compel the defendant to perform an act or duty which appears to be within his power, the judgment to be entered will be largely controlled by his future conduct." The

authority relied upon was United States v. Durling, 4 Biss. 510; 25 Fed. Cas. No. 15,010, in which the proceeding was treated as criminal.

In Bridges v. Sheldon, 7 Fed. Rep. 17, 42, the court in a proceeding in contempt stayed proceedings in a case in Vermont until the plaintiff should furnish evidence of dismissal of an action he had begun by service of process on the defendant while he was in Iowa taking depositions in the Vermont case.

In Bogart v. Electrical Supply Co., 27 Fed. Rep. 722, the court on a motion in the suit held that it was entirely proper to order an attorney to pay the costs which he had unnecessarily imposed upon his client, and that a decent regard for the dignity of the court required that obedience to the order be compelled. The statutes of New York prohibiting imprisonment for debt were held to have no application. The courts had always allowed the summary remedy of an attachment to compel an attorney to observe the duties incident to his professional relations toward his client.

In Southern, etc., Co. v. Houston, etc., R. Co., 27 Fed. Rep. 344, Judge Pardee refused to hold the officers of a bank for contempt in converting to their own use moneys deposited by certain receivers under an order of court, and this notwithstanding the bank might be held for contempt.

In re Ferry, 37 Fed. Rep. 649, Judge Sawyer refused to allow David S. Terry credits for good time while serving out a sentence imposed for contempt of court. The court doubted whether contempt was a criminal offense within

the meaning of the statute. There was no doubt, however, that as the credits were allowed annually, the acts which authorized them had no application to a sentence of only six months.

In Morss v. Domestic Sewing Machine Co., 38 Fed. Rep. 482, Judge Colt refused to impose more than a nominal fine for the violation of an injunction in a case where another federal judge had modified the injunction. It appeared that the modification induced the belief on the part of the defendant that he had the right to do those things of which complaint was made in the contempt proceeding; at least Judge Colt was persuaded that the violation was not intentional.

In Johnson Steel, etc., Co. v. North Branch, etc., Co., 48 Fed. Rep. 196, Judge Reed sustained a citation for contempt and ordered that the rule be not discharged until the defendant, a contumacious witness, had answered certain questions submitted at an examination before a master, and paid the costs of the contempt proceeding.

In Consolidated Roller Mill Co. v. Coombs, 39 Fed. Rep. 803, Mr. Justice Brown, then on the circuit, held that the owner of a patent could not be required to distribute his rights and the court refused to suspend an injunction where it was not clear that the casting out of the patented machine would not so disturb the business of a rolling mill as to inflict upon the defendant losses far in excess of the benefits which would accrue to the complainant. The court allowed twenty days time in which to change the offending machine, and intimated that its

use after that would be met with the coercive remedy of contempt in favor of the complainant and against the offending party.

In Toledo, Ann Arbor, etc., R. Co. v. Pennsylvania et al., 54 Fed. Rep. 746, Judge Ricks, in a proceeding to punish for contempt certain engineers who had violated an injunction against boycotting the Ann Arbor road during a strike of its locomotive engineers, apparently took the view that the proceeding as against one Lennon, an engineer, should be regarded as criminal rather than coercive or remedial, and a fine of fifty dollars and costs was imposed upon conviction. The case seems to follow, without citation, the rule of Judge McCrary in Van Zandt v. Argentine Min. Co., 48 Fed. Rep. 770. The two cases appear in this respect to be at variance with the current of judicial authority.

In re Copenhaver, 54 Fed. Rep. 660, it appeared that a judgment had been duly entered against St. Clair county, Missouri, and thereon a writ of mandamus had been duly issued, to compel the levying of a tax for the payment of the judgment. Copenhaver and others were judges of the county court of St. Clair county, and as such were the proper persons to levy the taxes required. They refused to make the levy, were cited for contempt and imprisoned. On a writ of habeas corpus Judge Philips outlined the history of the rule by which the remedy of contempt is allowed to suitors as a coercive measure in the execution of judgments.

In Sabin v. Fogarty, 70 Fed. Rep. 482, Judge Hanford

held that it was a contempt of his court for a sheriff to take on a writ of replevin at the action of a third party certain live stock which the United States marshal had sold upon process, but had not delivered, to one Burns. The order against the sheriff, Stinson, and the attorney, Lloyd, who represented the third party plaintiff in the action in replevin in the state court, was as follows:

> "The judgment of the court is that the defendants Stinson and Lloyd are guilty of contempt, as charged; and that they shall forthwith pay into the registry of this court, for the benefit of the parties concerned, the full amount for which the property was sold by the marshal, so that the marshal shall be protected, and so that Mr. Burns will be protected, to the amount of $40, paid by him on account of his bid at the sale; and that they each pay a fine of $10 and the cost of this contempt proceeding, and that every day in which they delay to pay into court the amount of money they are required to pay to make up the value of the property taken will be regarded as a continuing and additional contempt, for which there will be a fine of $50 against each of them."

In Animarium Co. v. Bright, 82 Fed. Rep. 197, Judge Kirkpatrick refused to require a sheriff to restore goods taken on a writ of replevin after the goods had been delivered by the marshal to the party against whom a state court issued the writ of replevin. Judge Kirkpatrick held that after their delivery by the marshal, the goods were no longer in the custody of the federal court.

In Davis v. Davis, 90 Fed. Rep. 791, Judge Lowell in a proceeding to punish for contempt a lawyer who refused, at the suit of his former client, to produce papers upon which he held an attorney's lien, ruled that the value of the lien depended upon the sequestration of the papers, and that it could not be destroyed by the summary process of a proceeding to punish for contempt. The rule against the attorney was discharged.

In re Greenberg et al., 106 Fed. Rep. 496, Judge Brown found it difficult in view of the magnitude of perjury to determine exactly the amount of money certain New York bankrupts were holding back, but he felt safe in reducing the amount found by the referee, from $22,000 to $14,000, and ordering the defendants to be committed if they failed to deliver the $14,000 within ten days.

In Smith v. Belford, 106 Fed. Rep. 658, the circuit court of appeals for the sixth circuit sustained the right of a district court to resort to punishment as for contempt to coerce a bankrupt into the delivery of his assets to the trustee.

In Tornanses v. Melsing et al., 106 Fed. Rep. 775, the circuit court of appeals for the eighth circuit resorted to proceedings in contempt to coerce Alexander McKenzie to obey writs of supersedeas allowed by Judge Morrow upon his granting an appeal from certain orders made by Judge Noyes at Nome, Alaska, appointing a receiver for certain gold mines, the order being made prior to the filing of a bill of complaint, and upon a cause of action, as it finally appeared, which was solely in ejectment, and

without any elements of equity. The receiver was committed to jail for six months, in each of the two cases, the court of appeals holding that the resistance of its writs constituted a criminal contempt.

In Champlain Construction Co. v. O'Brien et al., 107 Fed. Rep. 333, Judge Wheeler by the coercive proceeding of contempt compelled obedience to an order made in a state court before removal of the cause to the circuit court for the district of Vermont. The order of the federal court was that the injunction defendant pay an ascertained claim of $982.17 together "with the costs of this proceeding" within thirty days.

In re Nevitt, 117 Fed. Rep. 448, on writ of habeas corpus before Judges Sanborn and Lochren, the court again reviewed the cases of the judges of St. Clair county, Missouri, who are in prison for failure to comply with an order of the federal court, requiring the levy of certain taxes to pay certain judgments. Judge Sanborn in delivering the opinion of the court exhaustively reviews the authorities which differentiate the various classes of contempt. He holds that when the adjudicated rights of a private suitor, as set forth in an order or decree of court, are transgressed, it is the duty of the court to come to the relief of the injured party and to grant him such remedies as are within the power of the court. These may be coercive or compensatory. In the case of the Missouri judges, the relief granted to the complainant was to coerce by imprisonment the judges who refused to make the required tax levy. Judge Sanborn's opinion is itself a terse

digest of the cases, a concise summary of the controlling principles, and it can not be satisfactorily condensed. Doubtless there is not a more luminous exposition of the law in any of the circuit court reports. Among Judge Sanborn's conclusions are the following:

> "Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. Thompson v. Railroad Co., 48 N. J. Eq. 105, 108, 21 Atl. 182; Hendryx v. Fitzpatrick (C. C.), 19 Fed. 810; Ex parte Culliford, 8 Barn. & C. 220; Rex v. Edwards, 9 Barn. & C. 652; People v. Court of Oyer and Terminer, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; Phillips v. Welch, 11 Nev. 187, 190; State v. Knight, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; People v. McKane, 78 Hun 154, 160, 28 N. Y. Supp. 981, 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law 68. A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the

court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings. This is the nature of the case under consideration. These petitioners are imprisoned until they comply with the order of the court that they levy the tax to pay in part the judgment of the plaintiff, Douglas, against this county. This plaintiff has the legal right to the enforcement of this order by the coercive power of the court. The power of the president to grant reprieves and pardons of offenses against the United States does not extend to him the authority to release or destroy the civil rights of private individuals, and hence can not authorize him to deprive this plaintiff of his legal right to the enforcement of his mandamus by the commitment of the prisoners until they comply with the lawful order of the court. 13 Peters. Abr., p. 78; 3 Co. Inst. c. 105, pp. 236, 238; 4 Bl. Comm. 285; Jones v. Shore's Ex'rs, 1 Wheat. 471, 474, 4 L. Ed. 136; Van Ness v. Buel, 4 Wheat. 74, 4 L. Ed. 516; U. S. v. Lancaster, 4 Wash. C. C. 66; 26 Fed. Cas. 859; 5 Op. Attys. Gen. 532, 542."

Petersdorf in his Abridgment (volume 13, at page 78) says:

"The king's pardon can not be considered a legal discharge of an attachment for nonpayment of costs or nonperformance of an award; for, though such attachment be carried on in the shape of a criminal process for a contempt of court, yet it is in effect and substantially a civil remedy or execution for a private remedy."

Blackstone, in reciting the various contempts punishable by the courts, says:

(6) "Those committed by parties to any suit, or proceeding before the court, as by disobedience to any rule or order made in the progress of a cause, by nonpayment of costs awarded by the court upon a motion, or by nonobservance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such arbitration. Indeed the attachment for most of this species of contempts, and especially for nonpayment of costs and nonperformance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court; and therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by a general act of pardon. 4 Bl. Comm. 285.

"In Jones v. Shore's Ex'rs, 1 Wheat. 462, 4 L. Ed. 136, in U. S. v. Lancaster, 4 Wash. C. C. 66, 26 Fed. Cas. 859, and in 5 Op. Attys. Gen. 532, it was held that the president had no authority under his pardoning power to release that portion of fines or penalties for violations of law which

> inured to the benefit of private individuals. And how can this be otherwise? A pardon is a grant, a deed. But a deed does not and can not convey that which the grantor has never had. If it were conceded that the president by his pardon could grant to the petitioners all the right and interest of the United States in these proceedings for contempt, that grant would avail nothing here. The right to the enforcement of this mandamus by these proceedings for contempt is not vested in the United States, or in the president, and therefore they can not grant or release it. It is vested in the plaintiff in this judgment, Joseph M. Douglas. It is the right to the only execution, the only remedy, which the law vouchsafes to him for the collection of his judgment, and no department of the government—executive, legislative, or judicial—can lawfully take, release, or destroy it without paying or securing to him just compensation for his property; for this is his private property."

In re Hausman, 121 Fed. Rep. 984, the circuit court of appeals for the second circuit on a petition for revision of proceedings in bankruptcy held that a party should not be punished for failing to do that which he was unable to do.

In re Allen, 13 Blatchf. 271; 1 Fed. Case No. 208, Judge Shipman held that proceedings to punish for contempt under the former bankruptcy act, were remedial and coercive. He said:

> "Under this theory of the law the practice of the district courts has been to enforce the unobeyed orders of the register by proceedings in contempt

> which are instituted directly upon a neglect to comply with his order. * * * When the contempt consists of a violation of the order of the court and is a contempt not committed in its presence, and the statutes do not prescribe the form of the order of commitment, the defendant may be imprisoned until he be discharged by order of court or until further order of the court. Green v. Elgie, 8 Jur. pt. 1, p. 187, per Denman, C. J.; opinion of Chancellor Kent In re Yates, 4 Johns. 317; Yates v. Lansing, 4 Johns. 395."

In Thompson v. Scott, 4 Dill 508; 23 Fed. Cases No. 13,975, and prior to the act of congress allowing state courts to entertain actions against receivers appointed by federal courts, Judge Love held that it was criminal contempt to sue in a state court a receiver appointed by a federal court without having first obtained the consent of the federal court to sue. The court however discharged the rule on the respondents filing a stipulation to the effect that they would dismiss the action in the state court.

In United States v. Davis, 5 Cranch, C. C., 622; 25 Fed. Cases No. 14,926, the respondent ran off three slaves, for whose release as freemen petitions of habeas corpus were about to be filed. When the writs went out and were served the respondent made a return which was insufficient and evasive. Being at the time in court, the respondent was adjudged guilty of contempt in obstructing the administration of justice and was "committed to the custody of the marshal until he shall produce the said negroes or be otherwise discharged in due course of law."

THE OFFENSE IS CRIMINAL WHEN COMMITTED AGAINST THE PUBLIC OR THE AGENCIES OF THE PUBLIC AND THE FINE IS PUNITIVE.

In re Ellerbe, 13 Fed. Rep. 530, was a case in which a party had refused to obey a writ of subpoena. Judge McCrary, in considering the case, said: "A refusal to obey the process of a court of the United States is an attempt to obstruct the administration of justice and is plainly an offense against the federal government. A proceeding in contempt in a federal court is a criminal case to be prosecuted in the name of the United States. Riggs v. Supervisors, 1 Woolw. 377; Ex parte Kearney, 7 Wheat. 38. By the express terms of section 725 of the Revised Statutes of the United States the courts of the United States are authoized to punish contempt, and this necessarily implies that it is an offense against the United States. It has frequently been held to be an offense against the United States within the terms of the provision of the constitution which authorizes the president to pardon such offenders. Dixon's case, 3 Op. Atty.-Gen. 622; Conger's case, 4 Op. Atty.-Gen. 317; Rowan & Wells case, Id. 458."

In re Doolittle, 23 Fed. Rep. 544, the court treated as criminal an interference by strikers on one road with property of another railroad which was in the hands of a receiver.

In United States v. Kane, 23 Fed. Rep. 748, Judge Brewer fined certain men for criminal contempt for interfering with a receiver's performance of duties imposed

upon him by a federal court. The proceeding was instituted and prosecuted by the United States. There was no relationship whatsoever between the parties charged with contempt and the parties to the suit in which the receivership was pending, so that the proceedings in contempt had none of the attributes of a proceeding auxiliary to or for the relief of the parties to the suit.

In the United States v. Berry, 24 Fed. Rep. 780, the matter came on to be heard on a petition for discharge of strikers who had been convicted in the western division of the western district of Missouri, of interfering with the operation of the Wabash railroad in the hands of a receiver. The grounds for the petition were that while the convictions were had in the western district of Missouri the contemptuous acts were committed in the eastern district of Missouri. The opinion of Judge Krekel, which appears to have been delivered with the approval of Mr. Justice Brewer, resulted in the discharge of the strikers, the court holding: "The conclusions reached are that the proceedings in contempt are criminal in their nature; that they must be had in court, and, under the law dividing the western district of Missouri, in the division in which the offense was committed. The order will be that all the defendants be discharged, principals and sureties on the recognizance be released, and that the sentences heretofore passed be held for naught."

In Sharon v. Hill, 24 Fed. Rep. 726, the misconduct of a party in attendance before an examiner was held to be a crime and, though Mr. Justice Field and Judge Sawyer

were of opinion that punishment for contempt would lie, the matter was remitted to the grand jury.

In Naumburg v. Hyatt, 24 Fed. Rep. 898, the court held that while it was ordinarily a contempt for creditors adversely to attach property in the hands of a receiver, yet the court should not punish the attaching creditors if "the possession of the property was in no way disturbed and there was no hostile interference with the proceedings in the pending cause."

In Ex Parte Schulenburg, 25 Fed. Rep. 211, Mr. Justice Brown, construed the statute, section 725, concerning contempts, and held that it did not authorize him to punish for contempt a party who caused a writ of garnishment to issue out of a state court, and be served upon a party temporarily in Michigan to attend a trial in the federal court.

In re Higgins et al., 27 Fed. Rep. 443, Judge Pardee held that employes of a railroad which was in the hands of receivers, were officers of the court, and they as well as those who interfered with them were liable as for criminal contempt of court for transgressions against the property.

In Ex Parte Perkins, 29 Fed. Rep. 900, Judge Gresham released on a writ of habeas corpus one Perkins who was committed by a commissioner for contempt of court in refusing to answer questions at a preliminary examination had before the commissioner in a fraudulent election case. Judge Gresham held that a commissioner's power in contempt proceedings was limited to his right to refer the contumacious witness to the district court, where he might be proceeded against as for contempt.

In re Kays, Sheriff, 35 Fed. Rep. 288, a California sheriff was fined for refusing to accept a federal prisoner upon the same terms upon which state prisoners were admitted to the county jail.

In re Terry, 36 Fed. Rep. 419, Mr. Justice Field and Judges Sawyer and Sabin refused to remit a fine upon Terry for assaulting the marshal and other misconduct in court. Terry's petition for remission of the fine averred that he had no wrongful intent. The court held, however, that the intent which the law implied from such misconduct should not be nullified by the mere denial of the transgressor. The offense was further held to be one committed against the law.

In re Birdsong, 39 Fed. Rep. 599, Judge Speer imposed a fine of $50 on a jailer, who, exceeding his authority under a writ of commitment, inflicted cruel and inhuman punishment on a federal prisoner.

In re Sowles, 41 Fed. Rep. 752, an execution defendant seeking to defeat the enforcement of the writ at a sale of property, by printed circulars and by words represented to bidders and observers that the writ was invalid and irregular, and that any one purchasing under it would be sued by him. Judge Wheeler held that the act constituted an unlawful resistance to a lawful writ of the court, rendering the defendant liable to a penalty of $200, payable to the United States, and the costs of the suit, with an order of commitment to be enforced on failure to pay the fine.

In United States v. Murphy, 44 Fed. Rep. 39, Judge

Ross imposed a fine of $100 upon one who caused the arrest of a receiver on the charge that he was committing a nuisance under the laws of California in operating a steam motor company, as he had been by the United States court ordered to operate it.

In re Manning, 44 Fed. Rep. 275, Judge Brown in a New York circuit, construing the statutes as to the extent to which the process of federal courts ran, said: "Such contempts as fall within section 725 of the United States revised statutes are criminal offenses against the United States (Fisher v. Hayes, 19 Blatchf. 13; 6 Fed. Rep. 63; In re Pitman, 1 Curt. 186; New Orleans v. Steamship Co., 20 Wall. 387), and must be unhesitatingly punished."

In Van Zandt v. Argentine Min. Co., 48 Fed. Rep. 770, Judges McCrary and Hallett, in a suit involving the violation by a plaintiff of his own injunction, held that the proceeding was not remedial but criminal in its nature. The ruling would appear to be contrary to the current of authority, but for the circumstance, whatever respect it may be entitled to, that the offender was the party who had obtained the injunction. The matter of reciprocal injunctions is beyond the purpose of my investigation, and I pass the case without further comment. The court refers to Haight v. Lucia, 36 Wis. 355. The case is doubtless one of disobeying the process of the court rather than one of disobeying the injunction.

In the P. I. Nevius, 48 Fed. Rep. 927, in admiralty, Judge Brown in the southern district of New York, held that a vessel owner who steamed away from an officer who

had served a notice of an attachment and libel, was guilty of criminal contempt under the authorities In re Higgins, 27 Fed. Rep. 443, and In re Sowles, 41 Fed. Rep. 752.

In re Lake Erie, etc., Co. v. Bailey, 61 Fed. Rep. 494, Judge Baker was of the opinion that members of the Brotherhood of Locomotive Engineers, who violated an injunction, were guilty of a crime, because the element of conspiracy was present in the circumstance of membership in the brotherhood. The court imposed a vindicative fine for the punishment of the conspiracy. The position taken seems wholly at variance with previous adjudications, because conspiracy was a crime at common law. As early as 1812, the supreme court in United States v. Hudson, 7 Cranch 32, held that circuit courts had no jurisdiction to punish offenses which were crimes at common law. Judge Baker appears to have confused criminal contempt, which is an offense against the court, the right to punish, which is given by the judiciary act of 1789, with the right to punish common law crimes in contempt proceedings. The language of the opinion will not commend it as a judicial utterance and that the views expressed are not consonant with the current of authority is to be expected from the temper of the utterances.

In Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. Rep. 803, Judge Taft had before him one of the so-called Pullman strike cases. In an effort to boycott the Pullman company, the American Railway Union, under the leadership of one Debs, sent Frank W. Phelan to Cincinnati to call out the employes of the railroads, which were hauling the

Pullman coaches in their passenger trains. Among the companies whose employes Phelan sought to call out were those of Samuel L. Felton, as receiver of the Cincinnati, New Orleans and Texas Pacific Ry. Co., the receivership pending in the United States court. An injunction had been issued against Phelan and his associates, to prohibit them from doing the acts which were subsequently done. Judge Taft, with his usual dispassion and thoroughness reviewed the evidence and the law. Upon the evidence he found that Phelan had done the prohibited acts as against property in the hands of a receiver. Upon the law, Judge Taft held that the authorities persuaded him to punish as for criminal contempt. Judge Taft's differentiation of civil and criminal contempt seems to me to be worthy of place as an accepted rule in jurisprudence. He says that if the acts constituting the contempt, would, when directed against the rights of an individual, constitute a cause for civil action, they will when directed against the court or one of its officers constitute a cause of criminal contempt. Judge Taft imposed a penalty of six months imprisonment in the county jail.

In United States v. Jose, 63 Fed. Rep. 951, the defendant was charged with contempt in wresting from the court's receiver of a railroad certain logs on which he, the defendant, had not paid the freight. As to the nature of proof required to convict, the court followed the rule in criminal cases, saying: "Accusations for contempt must be supported by evidence sufficient to convince the mind of the trier, beyond a reasonable doubt, of the actual guilt of the

accused, and every element of the offense, including a criminal intent, must be proved by evidence or circumstances warranting an inference of the necessary facts; otherwise the defendant is entitled to go acquit."

In re Aker, 66 Fed. Rep. 290, Judge Knowles held that one who interfered with the operation of a railroad in the hands of a receiver was guilty of the misdemeanor of contempt of the court, whose receiver was obstructed.

In re Summerhayes, 70 Fed. Rep. 769, Judge Morrow held it to be criminal contempt for a grand juror to violate the admonition of the court, and disclose a subject under investigation by a grand jury. The court held that the punishment for contempt was proper, though there was mingled with the transaction other facts which constituted a crime punishable by indictment. The accused was committed to jail for six months.

In re Brule, 71 Fed. Rep. 943, Judge Hawley held it to be a criminal contempt to obstruct the administration of justice by corruptly inducing one known to possess material information, to avoid the writ of subpoena about to be served upon him as a witness. The court held that the offense was punishable either in contempt proceedings or upon an indictment for conspiracy. Proceeding by contempt was deemed the more efficacious, and Brule was sentenced to imprisonment for three months.

In Indianapolis Water Co. v. American Strawboard Co., 75 Fed. Rep. 972, Judge Baker points out the distinctions between criminal and civil contempt. Inasmuch as the case was held to be one in which the proceeding to punish

was remedial, it is more fully digested under that title of this memoranda which pertains to the proceeding as a remedy.

In Stateler v. California National Bank et al., 77 Fed. Rep. 43, Judge Morrow held it to be a contempt of his court for private suitors in a state court to seek to enforce the claims and distribute the assets of an insolvent national bank, the receiver of which had submitted himself and the assets of the bank to the jurisdiction of the federal court. To sustain his court in protecting his jurisdiction, Judge Morrow relied upon the statements of law made by Chief Justice Fuller in In re Tyler, 149 U. S. 164. For its concrete exposition of the law Judge Morrow's opinion is instructive.

In Mackall v. Ratchford et al., 82 Fed. Rep. 41, Judge Goff held striking miners guilty of criminal contempt in violating an injunction, in marching and countermarching along a public highway, the demonstration being, the court held, for the purpose of intimidation. The opinion does not disclose the extent, if any, of the damages sustained by the plaintiff. The defendants were imprisoned for three days. Judge Goff did not cite any authority to sustain his order.

In re Huntley, 85 Fed. Rep. 889, the circuit court of appeals for the ninth circuit, released on a writ of habeas corpus a prisoner who had been convicted and punished with a punitive fine for violating an injunction which the circuit court of appeals held was void for uncertainty.

In Pokegama Sugar-Pine Lumber Co. v. Klamath River

Lumber Co. et al., 86 Fed. Rep. 538, Judge Morrow fined and conditionally ordered the commitment of certain defendants whom he found guilty of criminal contempt in forcibly resisting a marshal who attempted to serve notice of a temporary order.

In Bowers v. Von Schmidt, 87 Fed. Rep. 293, Judge Morrow found the defendant guilty of violating an injunction which prohibited the sale of certain machines. A fine of $50 was imposed with a conditional order of commitment.

In Anderson v. Comptois, 109 Fed. Rep. 971, the circuit court of appeals for the ninth circuit held that Dudley Dubose, an attorney, was guilty of contempt in conspiring with his clients to resist a writ of supersedeas issued by the circuit court of appeals, on the granting of an appeal from a district court in Alaska, which had, without the filing of a complaint therefor, appointed one Alexander McKenzie receiver of certain gold mines at Nome. The accused was sentenced to six months imprisonment. The McKenzie case, to which the conviction of Dubose was incidental, came before the supreme court of the United States on an original petition for a writ of habeas corpus, and the action of the circuit court of appeals was held to be within its powers.

(See In re Alexander McKenzie, petitioner, 180 U. S. 536.)

In United States v. Weber, 114 Fed. Rep. 950, before Judge McDowell, it appeared that the judge of the United States district court for the western division of Virginia

in vacation entered an order whereby certain named persons, not including the defendants in the contempt proceeding, and "all other parties concerned, whose names be hereafter ascertained," were enjoined from entering upon the property of a coal mining company and from committing certain acts with respect to the employes of the receivers of that company, the receivers being in charge under appointment by the federal court. The defendants were charged with having knowingly and intentionally violated the order. Upon conviction the accused were sentenced to various terms of imprisonment.

In re Noyes, 121 Fed. Rep. 210, the circuit court of appeals for the ninth circuit held that it was criminal contempt for the federal court in Alaska to disregard writs of supersedeas, issued out of the court of appeals, and accordingly punished the judge of the Alaska court and those who were found to be conspirators with him.

In United States v. Haggerty, 116 Fed. Rep. 510, and in United States v. Gehr, 116 Fed. Rep. 520, a restraining order had been entered at the suit of the Guaranty Trust Company of New York v. Thomas Haggerty and others. The bill upon which the order was issued had been filed in the United States circuit court for the northern division of West Virginia. The plaintiff was trustee under a mortgage securing the bonds of the Clarksburg Fuel Company of West Virginia. Some of the defendants were citizens and residents of Pennsylvania, others of Ohio, others of Illinois and some of West Virginia. It is not disclosed that there were any pleas to the jurisdiction, so that the di-

versity of citizenship, it would seem, was apparent upon the face of the bill. The restraining order was entered upon the plaintiff's motion, supported by affidavits. Upon a hearing based on a rule to show cause it appeared that at a meeting held, certain of the accused denounced Judge Jackson who had made the order and that the miners who had quit work were urged to make the other miners "lay down their tools and come out." Defiance of the injunction was openly urged, but it does not appear that the advice of the speakers was acted upon. The accused were convicted of contempt for having held the meeting and for having denounced the judge. But for the element of holding this meeting the case would be substantially like the case against Luke E. Lawless, on account of which the impeachment trial of Judge Peck was held in the senate in the 20th session of congress, and which trial was followed by the act of 1831 amending the act concerning contempt. The only punishment inflicted as disclosed by the reports of the cases was ninety days imprisonment of the defendant, Gehr, in the last named case.

In Castner v. Pocahontas Collieries Co., 117 Fed. Rep. 184, Judge McDowell, on a writ of habeas corpus to secure the discharge of prisoners committed to jail by a commissioner, held that it was a crime against the United States to disregard the terms of a temporary restraining order entered in a suit between private parties to establish private rights and grant private redress. After citing New Orleans v. Steamship Company, 20 Wall. 387, which was a case wholly different from the one before him, and supple-

menting that citation with some of like kind from other federal courts, Judge McDowell quotes from Secor v. Singleton, 35 Fed. Rep. 378, as follows: "In cases where an injunction has been granted to enforce or maintain a merely private right, a proceeding instituted to punish a party for violating the order is very generally regarded as a proceeding to redress a private injury, in which the public have no concern, and for that reason the prosecutor or person filing the information must have an interest in the proceeding differing from that of the general public; otherwise the courts will not entertain the information." Judge McDowell differentiates the Secor case and the case he had to decide as follows: "This doctrine is not applicable to the case in hand. The injunction order here forbade acts which are in themselves offenses against the criminal laws of the state. It is a matter of common knowledge that strikes, especially strikes of coal miners, are frequently accompanied by lawless acts of intimidation. The complaint here charges this offense to the petitioners. In such cases the public is interested. The citizens generally are concerned to bring to an end the reign of terror created by the strikers. Certainly in contempts of this character every citizen has a right to make complaint against persons who, in violating the order of the court, at the same time violate the criminal laws of the state. Moreover, section 1014, Rev. St., provides that the procedure for the arrest and examining trial of offenders shall be 'agreeably to the usual mode of process in such state.' Certainly the usual procedure in this state, when there has been an offense

against the criminal law, is for any person knowing the facts to 'swear out' a warrant. I know of no Virginia authority requiring a different course in contempt cases."

Judge McDowell seems to disregard the familiar rule that a court of equity can not enjoin the commission of a crime. The instance is doubtless the only one in the history of federal jurisprudence in which a federal court in chancery has punished violations of the criminal laws of a state. It should be observed also that the parties punished by Judge McDowell were not parties to the suit. The court's views suggest the interesting theory that in such cases the criminal laws of the state supply sufficient notice to the accused, that punishment will follow if the acts prohibited be done.

In Ex parte Richards, 117 Fed. Rep. 658, Judge Keller held that a punitive judgment should be entered against the accused who violated a restraining order entered in a suit between private parties, involving only private rights. He also held that it was not essential to the validity of the restraining order that no subpoena issued upon the bill had been served upon the defendants. He also held that parties should be punished who were not parties to the bill, and also that it was not necessary for the injunction to have been served upon the parties accused, but they would be liable to punishment if they knew of the existence of the order. Judge Keller largely relies upon Bessette's case as an authority.

In Ex parte McLeod, 120 Fed. Rep. 130, Judge Jones, following the Terry and Neagle cases, held that it was a

criminal contempt to assault an officer of the court, at the time in the performance of his duties, but declined to punish the accused because the offense had been allowed to pass sixteen months without being called to the court's attention.

In Chisholm v. Caines, 121 Fed. Rep. 397, Judge Simonton holds that: "A person may be guilty of a contempt of court in doing an act which he knows the court has prohibited by injunction—as by wilfully trespassing on lands, with knowledge that the court had adjudged them to be private property, and had enjoined the defendants in the suit, and 'all persons whomsoever,' from trespassing thereon—although he was not a party to the suit, and is neither the agent or servant of, nor in privity with, any of the parties. In such case he is not technically guilty of a violation of the injunction, but of an independent act of disrespect to the court, and disregard of its decree, which constitutes a contempt of the court, and may be punished as such without reference to its effect upon the rights of the suitors."

Judge Simonton relies upon an English case to support his position. He disregards the fact that federal courts have only delegated powers and that they must be exercised as prescribed by the acts of congress. In the English courts a rule wholly different prevails. Those courts are an agency of the sovereign and they have many of the attributes of sovereignty. In England the people are subjects and the courts may exercise over and against them all the judicial powers and prerogatives which are not denied

to the sovereign by acts of parliment. If Judge Simonton's opinion came before this court in the form of an act of congress it would promptly be declared unconstitutional. It takes property without due process of law. It denies parties the equal protection of the law. Take an illustration: Suppose some labor union became incensed at its lawyer and undertook unfairly to drive him from the occupancy of his office to which his clients were wont to come. If the action of the union became a nuisance the lawyer could get a restraining order protecting him in the occupancy of his office. Suppose while such an order was in effect the lawyer's landlord, not being a party to the suit nor in privity with the labor union, would compel the lawyer to vacate for nonpayment of rent. Would the landlord be lawfully dealt with if punished as for contempt because he had accomplished the result which was denied to the labor union?

In re Fortunato, 123 Fed. Rep. 622, Judge Holt entered a punitive fine against attorneys who, disregarding an order in bankruptcy, caused the bankrupt to be punished by a state court for a prior contempt which he had committed in disregarding an order of the state court. The case is suggestive of the principles ruled upon by this court in the matter of Sachs and Watts, 190 U. S. 1.

In Dowagiac Manufacturing Company v. Minnesota, etc., Company, 124 Fed. Rep. 736, Judge Lochren expressed the opinion that proceedings to punish for contempt were always criminal. As to the use of proceeding for remedial or compensatory purposes he said: "I do not

think the object of contempt proceedings is to obtain damages from one party for the use of the other. Parties can not recover damages they have sustained in this summary manner ordinarily. They must be recovered in an ordinary proceeding. If there are any precedents for recoveries of this kind I am not familiar with them and none has been cited which convinces me that such is the proper proceeding."

In Ex Parte Beebees, 2 Wall., Jr., 127; 3 Fed. Cases No. 1220, Mr. Justice Grier held on a rule for the attachment of a witness, that the court should consider not only the advantages to the party, but, also, the inconveniences to the witness in determining whether there should be a penalty imposed for failing to comply with a writ of subpoena, and where the attendance imposed upon the witness a burden out of proportion to the advantage which would fall onto the party, the court discharged the rule.

In Ex Parte Benedict, 4 West. Law Month. 449; 3 Fed. Cases No. 1292, Judge Hall held that it was a criminal contempt of court for a marshal to obey the order of the secretary of war and in so doing to disregard an order of court. The case is one of the most interesting character and the principles involved are among the most important of any case in American jurisprudence. The controversy arose over the order of Secretary Stanton, of August 8, 1862, wherein it appeared that President Lincoln had attempted to suspend the writ of habeas corpus in certain cases without authority from congress. Benedict had been arrested for seditious utterances. Immediately upon his

arrest he was transported from the district in which he was arrested. His absence from the district made it impossible for the marshal to discharge the writ of habeas corpus, and on that ground alone the marshal was relieved of liability. Judge Hall exhaustively reviews the authorities pertinent to the powers of courts in England and in the United States, and notes the delimitation of common law jurisdiction wrought by the constitution of the United States. The case suggests a danger in holding that any proceeding for contempt is a criminal case within the power of the president to pardon. It suggests how an arbitrary executive, by the use of the pardoning power, could suspend the writ of habeas corpus in defiance of the judiciary.

In Doubleday v. Sherman, 8 Blatchf. 45; 7 Fed. Cases No. 4020, Judge Blatchford, having found the respondent guilty of the violation of an injunction, in determining the punishment, said:

> "The fact of the violation is established, and that it was wilful, although the master reports that the extent of the violation was not shown by the proofs offered before him. The fact that the extent of the violation is not shown, that is, the extent to which the plaintiffs were injured by the violation, is not a good reason for withholding the allowance of counsel fees and disbursements, which were made necessary to establish the violation itself, although it is good reason for not imposing on the defendant a further pecuniary fine by way of indemnity to the plaintiffs. The only doubt I have had is as to

whether a fine or imprisonment ought not to be imposed beyond the costs, counsel fees and disbursements, because of the wilful character of the violation of the injunctions, and to vindicate the process of the court, aside from such indemnity as is afforded to the plaintiffs. But, upon the whole, as the extent of the violation is not shown, so that the court could have some guide furnished thereby as to the proper amount of punishment to be meted out for the wilful character of the violation, I think that the proper decree will be, that the defendant Boas, pay as a fine for contempt, the $3,703.11, and that that sum be awarded to the plaintiffs toward indemnifying them, and that the defendant stand committed until the fine is paid by him."

In King v. Ohio, etc., R. Company and three other cases, 7 Biss. 529; 14 Fed. Cases 7800, decided at Indianapolis in 1877, Judge Drummond held that it was criminal contempt for strikers to interfere with the operation of railroads which were in the hands of receivers. The case is the earliest one I have been able to find on this particular question of fact. In his statement of his opinion the court treats the question as one of first impression and cites no authorities. The defendants upon conviction were sentenced to three months imprisonment subject to the further order of the court.

In re Mullee, 7 Blatchf. 23; 17 Fed. Cases No. 9911, Judge Blatchford held that the violation of an injunction so far partook of a criminal case as that a conviction therefor could be relieved only by the pardoning power of the

president. This case has been much cited and has been the leading authority in those courts which hold contempt of court to be a crime. In other courts the case is no longer regarded as an authority. The basis of criticism of Judge Blatchford's holding is that in so far as contempt of court is remedial either to coerce a civil litigant to do an act necessary to the administration of justice or to compensate an injured party, the order of conviction is a mere interlocutory order in a civil suit which the president has no more right to release than he would have to release a civil judgment which did not belong to him. If the president undertook such an act he would be giving one man's property to another without due process of law.

In Secor v. Toledo, etc., R. Company, 7 Biss. 513; 21 Fed. Cases No. 12,605, Judge Drummond reiterated his statement of the law made in King v. Ohio, etc., R. Company, *supra* (14 Fed. Cases No. 7800), and held that it was criminal contempt for strikers to interfere with the operation of a railroad in the hands of a receiver.

In Thompson v. Scott, 4 Dill. 508; 23 Fed. Cases No. 13,975, and prior to the act of congress allowing state courts to entertain actions against receivers appointed by federal courts, Judge Love held that it was criminal contempt to sue in a state court a receiver appointed by a federal court, without having first obtained the consent of the federal court to sue.

In United States v. DeVaughn, 3 Cranch, C. C. 84; 25 Fed. Cases No. 14,952, a venireman was asked if and answered that he, "had formed and delivered an opinion as

to the guilt of the defendant upon this indictment," and he said that he had done this since he had been served with summons to answer as a venireman, his hope at the time being that such conduct would relieve him from jury service. The court held that the conduct of the venireman was in contempt of court because it tended to obstruct the administration of justice. The venireman was fined $50.00 and excused from jury service.

Cases Arising Under the Interstate Commerce Act and Wherein the United States Appears as a Civil Litigant.

On July 2, 1890 (26 Stat. 209), congress passed an act concerning contracts, combinations and conspiracies in restraint of trade or commerce among the several others or with foreign nations. The fourth section of that act reads as follows:

> "Section 4: The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the cause and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the

> court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The act was resorted to and construed as early as 1893, but its importance was not emphasized until in 1894, when a controversy between the Pullman company and its employes at Chicago was taken up by an organization of railroad employes federated under the name "The American Railway Union." When the situation at Chicago became intolerable to the public, the attorney-general of the United States directed the filing of bills in various United States circuit courts to restrain the members of the American Railway Union and their abettors from the commission of those acts which were being constantly resorted to for the purpose of forcing the various railways of the country to compel the Pullman company to settle its difference with its employes. In each of the courts in which issues of law were joined on the bills so filed the judges went at length into the nature of the suit and the purposes to be attained thereby. The controlling idea in these various expositions of the law was that the United States as a civil suitor was taking recourse to chancery for the purpose of abating the nuisance that existed in the obstruction of the highways of interstate commerce. The proceeding was purely remedial, and the chancery practice was followed throughout. The leading cases in the circuit courts under this act of

congress, in the order of their apparent priority, are United States v. Workingmen's Amalgamated Council, submitted to Judge Billings at New Orleans, March 25, 1893 (54 Fed. Rep. 994); approved on appeal (57 Fed. Rep. 85); Toledo, etc., R. Co. v. Pennsylvania Co., submitted to Judge Ricks at Toledo, March 25, 1893, (54 Fed. Rep. 746); Id. submitted to Judge Taft at Cincinnati April 3, 1893, (54 Fed. Rep. 730); United States v. Elliott, submitted to Judge Thayer at St. Louis, July 6, 1894 (62 Fed. Rep. 801); approved in a ruling on a demurrer to the bill by Judge Philips, October 24, 1894 (64 Fed. Rep. 27); United States v. Alger, submitted to Judge Baker at Indianapolis, July 12, 1894 (62 Fed. Rep. 824).

The United States v. Debs, 64 Fed. Rep. 724, is sui generis. The restraining order was entered upon the several petitions of the United States and of the receivers of the Atchison, Topeka & Santa Fe railroad appointed in the suit against that road by the Union Trust Company.

Inasmuch as the Debs case is the authority of last resort for the great number of contempt cases which has since been prosecuted throughout the United States, it may be well to note that the writ of injunction was entered and issued not only as against Debs, Howard, Rogers, Kiliker and the American Railway Union, but also against "all persons combining and conspiring with them and all persons whomsoever." All were alike commanded and enjoined "to desist and refrain" from certain specified acts, and "from ordering, directing, aiding, assisting or abetting in any manner whatsoever, any person or persons to

commit any or either of the acts aforesaid." (64 Fed. Rep., pp. 726-727.) The order was so general in its scope as to parties that it may be said to have applied to any one of the general public whose conduct came within the purview of the acts specified and the scope of those acts was as broad as to include any and every sort of agression.

The following cases are sometimes popularly confused with proceedings taken under the act of July 2, 1890, viz.: Thomas v. Cincinnati, etc., Ry. Co., 62 Fed. Rep. 803, in which Frank W. Phelan was committed to jail by Judge Taft for interfering with Receiver Felton in the operation of a railroad; Arthur v. Oakes, 63 Fed. Rep. 310; These last mentioned cases all grew out of receiverships of railroads.

The Debs case came to this court first on a writ of error, which was dismissed for want of jurisdiction, Jan. 17, 1895 (159 U. S., p. 251), and then on a writ of habeas corpus, in which the petition for discharge was denied May 27, 1895 (158 U. S. 564). The Debs case on the writ of habeas corpus has been cited upon various propositions, as follows:

Postoffice.—Congress having assumed control over mails and commerce, may prevent unlawful interference. Approved in Addyston Pipe, etc., Co. v. United States, 175 U. S. 230, affirming 85 Fed. Rep. 271, 54 U. S. App. 776, enjoining combination to keep up price of pipe; dissenting opinion in United States v. Freight Assn., 166 U. S. 356, arguendo.

Commerce.—Congress may prohibit interference with commerce and mail transportation, and prosecute by indictment. Approved in United States v. Freight Assn., 166 U. S. 343, enjoining unlawful combination affecting commerce; North Bloomfield, etc., Min. Co. v. United States, 88 Fed. Rep. 675, 59 U. S. App. 395, affirming 81 Fed. Rep. 248, upholding act regulating hydraulic mining for protection of navigable rivers; Clune v. United States, 159 U. S. 592, arguendo. Distinguished in United States v. Joint Traffic Assn., 76 Fed. Rep. 898, United States can not enjoin railroad association from affecting agreement alleged illegal under interstate commerce law.

Nuisance.—Public nuisance, such as obstruction of highway, may be abated by government. Approved in American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. Rep. 614, and Vegelahn v. Guntner, 167 Mass. 99, 57 Am. St. Rep. 446, 35 L. R. A. 724, maintaining patrol to prevent workmen entering plaintiff's employ may be enjoined as obstruction to street. Equity may redress public nuisance by injunction. Distinguished in State v. Patterson, 14 Tex. Civ. App. 469, refusing to enjoin public gaming house.

Injunction.—In general, equity can not enjoin commission of crimes. Approved in Rhodes, etc., Mfg. Co. v. New Hampshire, 70 Fed. Rep. 723, federal court can not enjoin State officials from prosecuting criminal proceedings under law alleged unconstitutional; Taylor v. Kercheval, 82 Fed. Rep. 499, court of equity can not restrain marshal from removing deputy; State v. Patterson, 14

Tex. Civ. App. 470, nonenforcement of law does not justify equity in enjoining commission of offense of keeping gambling house; Consolidated Steel Co. v. Murray, 80 Fed. Rep. 828, arguendo. Injunction may issue to prevent interference with property rights violating criminal laws. Approved in Consolidated Steel, etc., Co. v. Murray, 80 Fed. Rep. 827, enjoining unlawful conspiracy by members of labor unions to interfere with plaintiff's business; Nashville, etc., Ry. v. McConnell, 82 Fed. Rep. 77, novelty of use for which asked is not fatal objection to issuance of injunction; American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. Rep., 613, 615, enjoining interference with employes by strikers; United States v. Sweeney, 95 Fed. Rep. 446, punishing violation of injunction against strikers; Gulf, etc., Ry. v. Miami S. S. Co., 86 Fed. App. 421, 52 U. S. App. 759, arguendo. See 61 Am. St. Rep. 711, note. Court issuing injunction has power to inquire into disobedience thereof. Approved in Pokegama, etc., Lumber Co. v. Klamath River Lumber, etc., Co., 86 Fed. Rep. 539, advice of counsel is no defense to violation of restraining order; Nassau Elec. R. R. v. Sprague Elec. Ry., etc., Co., 95 Fed. Rep. 415, order fining for violation of preliminary injunction is not reviewable except upon final appeal: United States v. Sweeney, 95 Fed. Rep. 447, courts have power and duty to punish violations of their injunctions; American Steel, etc., Co. v. Wire Drawers, etc., Unions, 90 Fed. Rep. 604, arguendo. Enforcing injunction by contempt proceedings is not executing criminal law, nor depriving party of jury rights.

Approved in United States v. Sweeney, 95 Fed. Rep. 449; violating injunction is not entitled to jury trial; State v. Markuson, 5 N. Dak. 158, one charged with contempt is not entitled to jury trial. United States has jurisdiction over every foot of soil within its territory. Approved in United States v. Flourney, etc., Real Estate Co., 69 Fed. Rep. 893, upholding United States jurisdiction over Indian reservations. Penalty for violating injunction is not substitute for prosecution for crime then committed. Approved In re Chapman, 166 U. S. 672, provision making refusal to testify before Congress a misdemeanor is valid, although refusal is also punishable as contempt.

Habeas Corpus.—Facts found by court investigating disobedience of injunction are not reviewable on habeas corpus. Approved In re Chetwood, 165 U. S. 462, judgments for contempt are not reviewable on error or appeal, but by certiorari; Tinsley v. Anderson, 171 U. S. 105, habeas corpus can not be used as writ of error to review contempt commitment.

Miscellaneous.—Cited in Butler v. Fayerweather, 91 Fed. Rep. 458, 63 U. S. App. 123, order committing witness for refusal to testify is final for appeal; Doane v. Lake Street El. R. R., 165 Ill. 519, 56 Am. St. Rep. 270, 36 L. R. A. 103, mere diminution, without irreparable injury, is not ground for injunction.

The Debs case on writ of error has been followed in this court, In re Chetwood, 165 U. S. 443, 462, and in Tinsley v. Anderson, 171 U. S. 101, 105, to the point that contempts are not reviewable in this court on writ of error.

Each of the subsequent citations is made in consideration of the particular issue before this court and in no case has the issue been decided by this court as to the right of review in the circuit court of appeals, in a case of so-called criminal, punitive or public contempt.

In United States v. Cassidy, 67 Fed. Rep. 698, appears Judge Morrow's charge to the jury in the trial of the criminal conspiracy cases which brought up the entire strike, so far as the Pacific coast was concerned. The charge is accredited with being the longest ever delivered in a criminal case in this country, but as it does not apply to contempt, no excerpts from it are made.

The Circuit Court of Appeals Act Gives the Right to a Review by Appeal or Writ of Error According to the Nature of the Principal Case in the Court Below

The appellant contends that his right to an appellate review by appeal, rather than by writ of error, is determined by the fact that the suit in which the attachment against him was issued was in equity. This court has many times asserted that the nature of the principal cause will fix the nature, and even the jurisdiction, of all subordinate proceedings. Rouse v. Letcher, 156 U. S. 47, and cases cited; Rouse v. Hornsby, 161 U. S. 588; Pope v. Louisville, etc., R. Company, 173 U. S. 573, 577, 578; Baggs v. Martin, 179 U. S. 206.

The act of congress of March 3, 1891, establishing circuit courts of appeals, and defining and regulating the jurisdiction of the courts of the United States, 26 Stat. 826, C. 517, was passed "to facilitate the prompt disposition of cases in this court and to relieve it of the oppressive burden of general litigation, which impeded the examination of cases of public concern and operated to delay suitors"—Chief Justice Fuller in Lau Ow Bew v. United States, 144 U. S. 47, at page 55. And at page 56 this court further says:

> "By section 6, the circuit court of appeals shall exercise appellate jurisdiction to review by appeal or by writ of error, final decisions of the circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law. The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed. McLish v. Roff, 141 U. S. 661, 666.
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> "The words 'unless otherwise provided by law' were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws would defeat the purpose of the act and be inconsistent with its context and its repealing clause."

In re Schlesinger, 102 Fed. Rep. 117, the circuit court of appeals for the second circuit seems to have pursued a

method not contemplated by the original act of Congress concerning circuit courts of appeals. Schlesinger, a bankrupt, had been ordered by the district court to deliver certain money to the trustee. The order was not obeyed. Pending proceedings in the district court to punish for contempt, the court of appeals entertained a petition to review the order of the district court. The proceeding in the circuit court of appeals may demonstrate the extent to which the right of an appellate review was enlarged by the amendment of February 18, 1895 (28 U. S. St. 666), or by the bankruptcy act.

In re Woods, 143 U. S. 202, 206, this court, in speaking of the act creating the circuit court of appeals and the supervisory power of the supreme court, said, through the chief justice:

> "But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters."

See also Forsyth v. Hammond, 166 U. S. 506, 512; Warner v. New Orleans, 167 U. S. 467, 474.

> "The fact that the circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals of another, under the same conditions, might furnish ground for a cer-

tiorari." Chief Justice Fuller in Columbus Watch Company v. Robbins, 148 U. S. 266, 270.

The appellate procedure sought to be pursued in this case is that prescribed by this court in United States v. Jahn, 155 U. S. 109. In that case the chief justice, at page 114, says:

> "Giving the act a reasonable construction, taken as a whole, we conclude: (1) If the jurisdiction of the circuit court is in issue and decided in favor of the defendant, as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court; (2) If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it; (3) If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court; (4) If in the case last supposed the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross-appeal or writ of error if the defendant has taken the case there, or independently,

> if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon the merits until the question of jurisdiction has been determined; (5) The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits."

In the same case this court holds (p. 112) that section six of the act creating the circuit court of appeals confers upon that court jurisdiction in all cases save those which are reserved to this court by section five. There is no class of cases unallotted or unassigned. United States v. American Bell Telephone Co., 159 U. S. 548, 551; Folsom v. United States, 160 U. S. 121; United States v. Rider, 163 U. S. 133, 139, 140; Robinson v. Caldwell, 165 U. S. 359; American Sugar, etc., Company v. New Orleans, 181 U. S. 277, 280.

FINAL AND INTERLOCUTORY ORDERS IN THE SUIT. CONTEMPT PROCEEDINGS ARE INTERLOCUTORY IN EQUITY AND HAVE THE LEGAL EFFECT OF AN ORDER CONTINUING THE INJUNCTION.

In Fisher v. Hayes, 6 Fed. Rep. 63, Judge Blatchford held that though the order of commitment was made in a suit in chancery, it was nevertheless a final judgment in a distinct criminal case. The court said:

> "It is well settled that contempt of court is a specific criminal offense, and that the imposition of

a fine for a contempt is a judgment in a criminal case. New Orleans v. Steamship Co., 20 Wall. 387, 392. Although there has as yet been neither an interlocutory nor a final decree on the merits in this suit, yet the order imposing the fine for the contempt was a final order or judgment as to the matter of the contempt. The last order as to that matter was made prior to the April term, 1880. Since it was made the April term, 1880, has begun and ended, and we are now in the October term, 1880. The defendant's motion has not been made till in the present term. The general power of the court over its own judgments, orders, and decrees in civil and criminal cases, during the existence of the term at which they are first made, is held to be undeniable (Ex parte Lange, 18 Wall. 163, 167), and it is further held that the power to vary a final judgment or order, at least in a case where there was jurisdiction to make it, does not exist after the term at which it was made. Bank of United States v. Moss, 6 How. 31; The Bank v. Labitut, 1 Woods 11. In U. S. v. Moss it was held to be too late after final judgment and at the next term, and by motion only, to set aside a judgment on account of a supposed want of jurisdiction; and the authorities cited in that case show it to be well settled that no error of law or fact, if any, not involving jurisdiction, committed by this court in making the order now sought to be vacated, can be rectified by this court on this motion."

This cause afterwards came before this court on a writ of error (Fisher v. Hayes, 102 U. S. 121). This court speaking by Chief Justice Wait, said:

> "If the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only."

In Bridges v. Sheldon, 7 Fed. Rep. 17, the court stayed a writ of execution in favor of a judgment plaintiff until he should dismiss an action in a state court in which he had caused the writ of summons to be served on the judgment defendant while in attendance upon the federal court.

In Searle v. Worden, 13 Fed. Rep. 716, Mr. Justice Brown, then on the circuit, entertained proceedings in contempt in a patent suit; fined a guilty party an amount equal to his profits made in violating an injunction, and ordered that the fine be paid to the party aggrieved. On appeal to this court it was held that the judgment in the contempt proceeding was a mere interlocutory order or decree and reviewable on appeal. (Worden v. Searle, 121 U. S. 14.)

In United States v. Atchison, etc., R. Co., 16 Fed. Rep. 853, Judge McCrary held that it was improper to take an accounting because that was "in the nature of further relief to the complainant."

In Hendryx v. Fitzpatrick, 19 Fed. Rep. 810, Judge Lowell held that the order of commitment was interlocutory and subject to be reopened after the term, a power the court could not exercise if the judgment were a final

one in a criminal case. The learned judge exhaustively reviews the statutes and authorities.

In Burr v. Kimbark, 29 Fed Rep. 428, the defendants were charged, in proceedings to punish for contempt, with having violated an injunction. Their answer was in effect that their acts in the premises were in the exercise of rights separate and distinct from those involved by the injunction, and that the complainant had no right to assert the claims he was putting forth in the proceedings to punish for contempt. In deciding the case, Judge Blodgett passed upon the rights asserted in the answer, and held that while their ultimate determination must await the final decision of the suit, nevertheless there had been a violation of the injunction.

In Temple Pump Co. v. Goss Pump Co., 31 Fed. Rep. 292, Judge Blodgett held that in case the fact of infringement of a patent was doubtful, the complainant should be required to proceed by a separate suit rather than have the matter of infringement determined in a contempt proceeding.

In Howard v. Mast, etc., Co., 33 Fed. Rep. 867, Judge Nelson construed an injunction but refused to extend it in contempt proceedings so as to include a device not described in the original bill. He held that an independent suit would have to be brought in order to protect such interests as the complainants might have as against the new devices.

In Clark v. Wilson, 33 Fed. Rep. 331, Judge Lacombe refused to punish for contempt a party to a suit who, upon

an examination before a master, answered that he had not manufactured or sold infringing articles. The court held that it was the duty of the master under the reference to ascertain from the respondent's books and business what he had been doing, and that the answer was not, therefore, impertinent. The court instructed the master to proceed in the ascertainment of facts.

In Ulman v. Ritter, 72 Fed. Rep. 1000, Judge Jackson fined Ritter $100 for violating an injunction, and upon the same hearing denied a petition to modify the order previously made, but continued it as a temporary injunction. The opinion does not disclose whether the fine was due to the complainant, or to the United States, though the court seems to have regarded the proceedings as remedial, for he allowed an execution to issue after ten days, to enforce the collection of the fine.

This court has repeatedly held that an order in a suit in equity committing for contempt is an interlocutory order. In Newport Light Co. v. Newport, 151 U. S. 527 this court said, on page 539:

> "In Hayes v. Fischer, 102 U. S. 121, 122, an injunction was granted. Complaint was made against Hayes for a violation thereof, and proceedings were instituted against him for contempt, which resulted in an order by the court that he pay a certain fine, and stand committed until the order was obeyed. To reverse this order, Hayes sued out a writ of error to this court, which the defendant in error moved to dismiss, on the ground that such proceedings in the circuit court could not

be re-examined by this court. The court, speaking by Mr. Chief Justice Waite, said: 'If the order complained of is to be treated as part of what was done in the original suit, it can not be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it can not be re-examined here either by writ of error or appeal. This was decided more than fifty years ago, in Ex parte Kearney, 7 Wheat. 38, and the rule then established was followed as late as New Orleans v. Steamship Company, 20 Wall. 387.' The court held that it had no jurisdiction, and dismissed the writ of error."

MEANING OF THE WORD "CASE," AND HEREIN REFERENCE IS MADE TO PROCEEDINGS APART FROM THE ENFORCEMENT OF CIVIL REMEDIES.

In the lexicography of jurisprudence, the word "case" seems to have a well settled meaning. In King v. McLean Asylum, etc., 64 Fed. Rep. 331, the circuit court of appeals for the first circuit gives an interesting and instructive review of the use of the word. In applying quotations from this court, Judge Putnam, speaking the opinion of the court of appeals, at page 339, says:

"In Smith v. Adams, 130 U. S. 167, Mr. Justice Field groups together, within the same quotation

marks, the words 'cases' and 'controversies,' as though they were entirely interchangeable, and he says (page 173, 130 U. S.): 'Whenever the claim or contention of a party takes such a form that a judicial power is capable of acting upon it, then it has become a case or controversy.' In Interstate Commerce Commission v. Brimson, 154 U. S. 447, the supreme court cites, on page 475, 154 U. S., with approval, this phraseology of Mr. Justice Field, and itself, on the same page, and on page 478, 154 U. S., uses the same words as interchangeable. It must be admitted that both of these decisions should be classed as relating to cases in law and equity arising under the laws of the United States. These expressions, therefore, so far as the case at bar is concerned, might be regarded as dicta, yet the cases touching the writ of habeas corpus itself come directly in point. In Holmes v. Jennison, 14 Pet. 540, it was held that this proceeding constitutes a 'suit,' within the meaning of that word, as used in the judiciary act of 1789, sec. 25 (1 Stat. 85). In Kurtz v. Moffitt, 115 U. S. 487, the court, on page 494, 115 U. S. , said: 'A writ of habeas corpus sued out by one arrested for a crime is a civil suit or proceeding, brought by him to assert the civil right of personal liberty against those who are holding him in custody as a criminal.' Ex parte Milligan, 4 Wall. 2, is still more in point. On page 112 the court said: 'In any legal sense, "action," "suit," and "cause" are convertible terms.' Milligan supposed he had a right to test the validity of his trial and sentence, and the proceeding which he set in operation for

> that purpose was his 'cause or suit.' The court goes on at considerable length to develop this proposition. Thus it was determined in advance that the pending case is a suit, and therefore a controversy, and also that it is the suit, not of the state, but of the petitioner."

In New Orleans v. Steamship Company, 20 Wall. 387, 392, the supreme court said: "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."

"Contempt of court is a specific criminal offense." In re Swan, 150 U. S. 637, 652.

In United States v. Jacobi, 1 Flip. 108, 26 Fed. Cases No. 15,460, decided in 1871, Judge Withey held on a motion to arrest and remove Jacobi from Tennessee to Arkansas that the respondent in wilfully disregarding a writ of subpoena issued by the federal court in Arkansas had committed a crime against the United States. The court reviews the older authorities which hold that a conviction for contempt is a judgment in a distinct criminal case, and says that the facts under consideration show as distinct a right on the part of the United States to arrest and remove as there "would be in any other case of crime."

Such being the meaning of the word "case," at the time congress passed the act creating the circuit court of appeals and distributing the jurisdiction of "cases," it follows that "cases" of contempt were contemplated by congress in its designation given in the clause 'in all other cases,' and that the right to an appellate review was thereby

given to parties and the jurisdiction to review was vested in the circuit court of appeals.

TABLE CONTAINING AN ABSTRACT OF CONTEMPT CASES IN CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES, ARRANGED (1) GEOGRAPHICALLY AND (2) ACCORDING TO STATUTORY CAUSES OF CONTEMPT, AND SHOWING HOW THE CASES WERE DISPOSED OF.

CIRCUIT.	Misbehavior of Persons.	Misbehavior of Officers.	Disobeying Process.	Disobeying Injunctions.	Disobeying Orders (Labor).	Interference With Property.	Discharged.	Coercive Remedy.	Compensatory Remedy.	Punitive Remedy.	Compensatory and Punitive.	Motions Denied.	Total.
First	3	1	...	4	...	...	3	...	2	2	...	1	8
Second	4	1	7	26	...	3	5	7	14	8	5	3	41
Third	12	...	7	9	...	2	3	6	2	11	1	6	30
Fourth	1	1	2	3	5	...	...	2	...	8	...	2	12
Fifth	2	1	1	...	...	1	1	...	...	3	...	1	5
Sixth	2	1	3	5	4	2	1	3	2	7	2	1	17
Seventh	2	...	...	12	5	1	4	2	3	7	2	2	20
Eighth	2	1	8	10	2	3	4	2	2	16	1	1	26
Ninth	6	1	6	6	...	2	...	2	6	10	2	1	21
Total	34	7	34	75	16	14	21	24	31	72	13	18	180

REVIEWS IN CONTEMPT PROCEEDINGS SINCE THE CIRCUIT COURT OF APPEALS WAS CREATED.

In re Spofford, 62 Fed. Rep. 443, Judge Wheeler, on an order against Spofford to show cause why he should not be punished for contempt in failing to obey a sub-

poena duces tecum issued upon the order of a circuit court, in an examination before a master, said:

> "As the witness has been in no sense contumacious, but has declined to be sworn or to produce *the books only in order to present objections which* his counsel not unreasonably supposed to be well founded, the order may be in the alternative. It will, however, be made peremptory and final, if witness' counsel so desire; and in that case I shall, by a subsequent order, stay its operation until appeal can be heard and determined by the circuit court of appeals. The supreme court has, it is true, repeatedly held that it could not, either by appeal or writ of error, review the action of a circuit court, inflicting fine or imprisonment for a contempt (Ex parte Kearney, 7 Wheat. 38; New Orleans v. Steamship Co., 20 Wall. 387; Hayes v. Fischer, 102 U. S. 121), on the expressed ground that no appellate jurisdiction in such cases had been conferred upon it by the laws of the United States. The old common-law rule, however,—that the order of a court, whose decisions on all other questions are reviewable, is sacred, and [may] not be inquired into, when it inflicts punishment for contempt,—seems abhorrent to the sense of natural justice. It puts the property and personal liberty of one individual practically at the mercy of another, who, being human, may presumably act, upon occasions, mistakenly, or from prejudice or passion. And it may well be that the circuit court of appeals may find in the broad grant of appellate jurisdiction to review final decisions of the circuit courts 'in all cases other than those (where jurisdiction to

> review is conferred on the supreme court),' which is contained in section 6 of the act of 1891, sufficient warrant for holding that final orders, such as the one here moved for, may be by it examined into, reversed, or otherwise determined."

In Gould v. Sessions, 67 Fed. Rep. 163, the circuit court of appeals for the second circuit reversed an order imposing a fine of $500 for contempt of court in violating an injunction and this, after the same court, on appeal in the principal suit had affirmed the judgment, including all interlocutory orders, in favor of the plaintiff. Upon the particular facts presented, the court of appeals was of the opinion that the order imposing the fine was aside from the proceedings in the principal suit, and that such questions attended the order as to make it a distinct criminal case reviewable on writ of error.

In Cary Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. Rep. 873, the circuit court of appeals for the second circuit entertained a writ of error to review a judgment in contempt proceedings rendered in the United States circuit court for the southern district of New York. The case was one in which a defendant was charged with having violated an injunction in a patent suit. The lower court having adjudged the defendant guilty, imposed a fine of $2,000 to be divided equally between the complainant for his compensation, and the United States. The fine was therefore equally remedial and punitive. The procedure seems to resemble that adopted by Judge Taft in Thomas v. Cincinnati, etc., R. Co. et al., 62 Fed. Rep.

803, in which Frank W. Phelan was convicted of contempt in the dual form of interfering with a receiver and violating an injunction. Doubtless, out of consideration for the liberty of the citizen, which the criminal procedure so jealously guards, Judge Taft disposed of the mixed cause as a criminal cause, notwithstanding the civil element it contained. When the circuit court of appeals for the second circuit acted upon the writ of error, it had before it the whole cause. There does not seem to have been any effort on the defendant's part to segregate the civil from the criminal contempt in the lower court.

In Enoch Morgans Sons v. Gibson, 122 Fed. Rep. 420, the United States circuit court of appeals for the eighth circuit, following the precedent set by the circuit court of appeals for the second circuit in Gould v. Sessions, 67 Fed. Rep. 163, entertained an appeal to review an order in contempt proceedings entered in the circuit court of the United States for district of Nebraska for the violation of an injunction. In speaking for the court, Judge Thayer said:

> "Two questions are presented by the record for determination by this court. The first is whether the order made is one from which an appeal will lie; and, if this question be answered in the affirmative, the second question is whether the order discharging the rule to show cause was a proper order.
>
> "Relative to the first of these questions, it is to be observed that in the case of Hayes v. Fischer, 102 U. S. 121, Hayes was cited to appear and show cause why he should not be punished for vio-

lating an interlocutory injunction granted in a patent case. Upon such hearing a fine was imposed, whereupon he sued out a writ of error. On a motion made to dismiss this writ, it was sustained on the *ground that, if the proceeding was to be* treated as a part of what was done in the original case, the action taken could only be reviewed on appeal after a final decree therein, which had not been entered; whereas, if it was to be treated as something entirely independent of that suit, the action taken could not be reviewed in any form—citing Ex parte Kearney, 7 Wheat. 38, and New Orleans v. Steamship Company, 20 Wall. 387. In the latter case (New Orleans v. Steamship Company) it was held that a fine imposed for contempt was a judgment for a specific criminal offense which could not be reviewed by the supreme court of the United States on a writ of error, or in any form, as the court had no jurisdiction in criminal cases at that time save on a certificate in case of a division of opinion in the lower court. The decision of the circuit court of appeals for the second circuit in Sessions v. Gould, 63 Fed. Rep. 1001, was based upon the same facts as the decision in Hayes v. Fischer, an appeal from an order imposing a fine for the violation of an interlocutory injunction having been taken prior to a final decree. The appeal was accordingly dismissed; but in the same case at a later period, and after a final decree had been entered, a writ of error was sued out to obtain a reversal of the order imposing the fine, and the writ was entertained and the order reversed; the court holding that the contempt proceeding was independent of the proceedings in the

original case and reviewable on writ of error. Gould v. Sessions, 67 Fed. Rep. 163. So, also, in the case of Worden v. Searls, 121 U. S. 14, where a fine had been imposed for disobeying an interlocutory injunction, the supreme court reviewed the action of the lower court in imposing the fine on an appeal that was taken after a final decree, saying that the action of the lower court in imposing fines for disobeying its orders was not a matter that was so far discretionary with the court as to prevent such action from being reviewed.

"It is a well-known fact, to which allusion has twice been made in decisions of this court (In re Reese, 107 Fed. Rep. 942, 945; In re Nevitt, 117 Fed. Rep. 448, 458), that contempts of court are of two kinds—those that are prosecuted to punish persons for showing disrespect to the courts, either by offensive conduct in their presence or by setting their authority at defiance, in the prosecution of which the entire public is immediately interested, because the welfare of the courts is concerned; and those contempt proceedings that are inaugurated at the instance of some private litigant or litigants to compel obedience to an order or decree made in the case for the protection of their individual rights. In the latter class of cases the public at large is not directly interested. The proceeding does not partake of the character of a public prosecution at the instance of the state, as for a crime committed in setting the authority of its courts at defiance, but the proceeding is rather of a civil or remedial nature, for the benefit of a particular individual or individuals whose rights can not be otherwise preserved. The distinction between the

two kinds of contempt has been recognized in other cases. People, etc., v. Diedrich, 141 Ill. 669, 670, and cases cited. The case in hand is obviously a contempt proceeding of a civil and remedial nature as distinguished from one of a public or criminal character. The public had no special concern in the question whether the appellee had used words on his labels which violated the injunction, but the appellant was deeply interested in that question, since, if the charge was true, it affected a property right which he had succeeded in establishing. Moreover, if that right was being invaded by the appellee, notwithstanding the decree, the court which entered the decree could with no greater propriety refuse relief, when the fact was called to its attention by the appellant, than it could withhold an execution to collect a judgment which it had rendered. We are of opinion, therefore, that the final action of a court in such a case as the one at bar, whether it be an order discharging the rule to show cause or one imposing a fine tantamount to the injury that has been sustained by the complaining party, is subject to review, and that in equity cases like the one at hand, where the object is to enforce the provisions of a final decree and compel obedience thereto, the remedy is by such an appeal as was taken. We think that this view is fully sustained by the action taken by the supreme court in Worden v. Searls, 121 U. S. 14, 26. It was expressly held in that case that the action taken by the lower court, in imposing a fine, was brought before the court for review by an appeal taken after the entry of a final decree, and that the action by the court in that

matter was not so far discretionary that it could not be reviewed. And so we may say in this case that the order of the lower court discharging the defendant was not so far discretionary as prevents it from being reviewed. Moreover, it is too plain for argument that the action taken below was in every respect final, and that no relief could be obtained, if the action was erroneous, otherwise than by an appeal.

"Holding, as we do, that the order in question was one from which an appeal will lie, and that the case is properly before us for review, we proceed to inquire whether the order discharging the defendant was a proper order."

It will be observed that the court allowed the appeal without consideration of the amendment of February 18, 1895 (28 Stat. at Large 666), allowing appeals where the proceedings are interlocutory. Nor does the court consider a case which, while in equity, is prosecuted against a person who for jurisdictional reasons can not be made a party to the main suit and who is denied all appellate relief unless he can appeal from the interlocutory order fining him for the contempt.

In United States, ex rel. Hill, v. Towns, 7 Ben. 444; 28 Fed. Cases No. 16,534, Judge Blatchford held in admiralty that an appeal to the circuit court carried with it a question of contempt arising out of the act of a party charged with removing a vessel from the jurisdiction of the court.

In Westinghouse Air Brake Company v. Christiansen, 123 Fed. Rep. 632, Judge Lacombe refused to suspend until the final hearing an order committing for contempt, the court holding that under the authority of Gould v. Sessions, 67 Fed. Rep. 163, and Carey Company v. Acme Company, 108 Fed. Rep. 873, the order of commitment was interlocutory and subject to appellate review.

In Smith v. Vulcan Iron Works, 165 U. S. 518, this court reviewed the diverse methods of procedure in the various circuit courts of appeals, as illustrated in numerous decisions cited, and held that under the act of March 3, 1891, c 517, sec. 7, an appeal to the circuit court of appeals from an interlocutory order or decree of the circuit court granting an injunction in a patent case might be taken from the whole order or decree and thereupon the court of appeals might dispose of the case on its merits and direct a final decree dismissing the bill. While, as this court declares, the policy of the circuit courts of appeals has been to take a broad view of the act of 1891, yet it seems that congress desired the courts of appeals to have the utmost latitude in speedily determining the issues presented by interlocutory orders and accordingly passed the act approved February 18, 1895 (28 Stat. at Large 666), which makes all orders appealable which may involve the merits of the controversy. See In re Tampa Suburban R. Company, 168 U. S. 583; Huguley, etc., Co. v. Galeton Cotton Mills, 184 U. S. 290, 294; In re Huguley Company, 184 U. S. 297, 301.

This memorandum is intended to be only a review of the law of contempt, as that law appears to the courts. It is therefore presented as a memorandum of additional cases, with no argument in favor of the appellant other than that made by the logic of the cases cited.

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

Indianapolis, Ind., February 20, 1904.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

No. 142.

EDWARD E. BESSETTE

vs.

W. B. CONKEY COMPANY.

On Certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR APPELLEE.

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER,
Counsel for Appellee.

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STATEMENT OF FACTS.

The facts disclosed by the certificate of the Circut Court of Appeals may be briefly summarized as follows:

On August 24, 1901, the W. B. Conkey Company, a corporation of Illinois, filed its bill in the United States Circuit Court for the District of Indiana, against James K. Russell and many others, citizens of the State of Indiana (appellant Edward E. Bessette not being a party to the cause). The bill prayed for an injunction against the defendants, their confederates, agents and servants, restraining them from interfering with the operation of complain-

ant's printing house in Hammond, Indiana. Upon the filing of the bill a temporary restraining order was issued restraining and enjoining the defendants, their confederates, servants and agents, and all persons then or thereafter aiding or abetting the defendants, or any of them, or confederating with or acting in concert with them, or any of them, from interfering with, hindering or obstructing the business of the complainant and from entering upon its grounds and factory for the purpose of interfering with, hindering or obstructing its business or from compelling or inducing or attempting to compel or induce by threats, intimidation, persuasion, force or violence any of complainant's employees to refuse or fail to perform their duty as such employees, or to leave complainant's service. The order also restrained the defendants from collecting in or about the approaches to complainant's buildings for the purpose of intimidating, threatening or coercing any of complainant's employees, and also interfering with employees in getting to and from their work.

On September 13, 1901, the complainant filed its petition in the cause, setting forth that various persons, among them some of the defendants to the bill, and also appellant, Bessette, were in contempt of the restraining order, and asked that a writ of attachment be issued against them, and that they be held to answer for such contempt. This petition charged, among other things, that Bessette and others, not defendants to the bill of complaint, had been, and were, at Hammond, Indiana, conspiring and confederating with the defendants to do the things prohibited by said restraining order, and that they had actual notice and knowledge of the said restraining order; that said Bessette and the others named had, on numerous occasions and in various ways, particularly set forth in said petition, knowingly and delib-

erately violated the restraining order, within the jurisdiction of the court.

Upon the filing of the petition the respondents therein, including Bessette, were ordered to show cause why they should not be punished for contempt. Bessette appeared and filed his answer, and upon a trial the court found him guilty of contempt, as charged, and imposed a fine of $250, payable to the United States, and costs of the proceedings against him. From this order, or judgment, imposing a fine, Bessette prayed an appeal to the Circuit Court of Appeals, which was allowed, and the appeal duly docketed in the Circuit Court of Appeals.

That court being in doubt as to its jurisdiction in the premises certified to this court for decision the following questions:

First. Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of a Circuit Court of the United States finding a person guilty of contempt for violation of an order of that court and imposing a fine for the contempt.

Second. Whether the "Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States and for other purposes" approved March 3, 1891 (26 Statutes, 826), authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States finding a person, not a party to the suit, guilty of contempt for violation of an order of that Court made in such suit and imposing a fine for such contempt.

Third. Whether if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error.

ARGUMENT.

I.

An order adjudging a person in contempt and imposing a punishment therefor can not be reviewed either by appeal or writ of error.

There can be no doubt that by the common law of England a judgment finding a person guilty of contempt could not be reviewed by appeal or writ of error, or on habeas corpus. In Crosby's case, 3 Wils., 188, Mr. Justice BLACKSTONE said:

> "All courts, by which, I mean to include the two houses of parliament, and the courts of Westminster Hall, can have no control in matters of contempt. The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court. Infinite confusion and disorder would follow if courts could, by writs of habeas corpus, examine and determine the contempts of others. This power to commit results from the first principles of justice, for if they have power to decide, they ought to have power to punish; no other court shall scan the judgment of a superior court, or the principal seat of justice; as I said before, it would occasion the utmost confusion, if every court of this Hall should have power to examine the commitments of the other courts of the Hall for contempts;

so that the judgment and commitment of each respective court, as to contempts, must be final, and without control. It is a confidence that may with perfect safety and security, be reposed in the judges and the houses of parliament."

Crosby's Case, 3 Wils., 188, 204.

The opinion cited was delivered in 1771, just prior to the American Revolution, and may thus be taken as expressing the law of England and her colonies at the time of the separation of the colonies from the mother country.

In *ex parte* Kearney, 7 Wheat., 38, decided by this court in 1822, which we discuss later, Mr. Justice Story, delivering the opinion of the court, cited with approval, and followed the decision in Crosby's case, holding that this court would not review a commitment for contempt of another court.

In the case of *ex parte* Yates, 4 Johnson, 314, Chief Justice KENT, after reviewing the English cases and referring to the case of the Earl of Shaftsbury, 1 Mod., 144, said:

> "The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind in which great confidence is placed, *must be the sole judge in the last resort of contempts arising therein*, is more explicitly defined and more emphatically enforced in the two subsequent cases of *The Queen* vs. *Paty and others*, and of *The King* vs. *Crosby*."

Further on, in commenting on these and other cases, Chief Justice KENT says:

> "I have cited the opinion of these judges much at large because I could not hope to improve upon the strength of their observations, and I entertain the most perfect conviction that the law, as they declared it in

this case, was well understood and definitely established as part of the common law of England."

4 Johnson, 369, 372.

The same rule has been declared by the Supreme Court of Pennsylvania in these words:

"Does anybody doubt the jurisdiction of the District Court to punish contempt? Certainly not. All courts have this power, and must necessarily have it; otherwise they could not protect themselves from insult or enforce obedience to their process. Without it they would be utterly powerless. The authority to deal with an offender of this class belongs exclusively to the court in which the offense is committed; and no other court, not even the highest, can interfere with its exercise. either by writ of error, mandamus, or *habeas corpus*."

Williamson's Case, 26 Penn. St., 9, 18.

After the decision in *ex parte* Kearney, *supra*, the subject did not again come before this court until the case of *New Orleans* vs. *Steamship Co.*, 20 Wall., 387. The court then took occasion to reaffirm *ex parte* Kearney and to hold the order of commitment not reviewable even on appeal from the final decree.

In the case of *New Orleans* vs. *Steamship Co.* a bill had been filed by the Steamship Company against the City of New Orleans in the United States Circuit Court. While that bill was pending Clark, the mayor of the city, filed a bill against the Steamship Company in the state court and obtained an injunction restraining the company in certain matters within the scope of the litigation in the federal court. At the final hearing a decree was entered enjoining the city from interfering with the company's property and directing the city to pay the company $8,000 damages, and as a part of this final decree Clark was

found to be in contempt and fined $300. From this decree an appeal was taken.

After reviewing the decree in other respects this court said:

> "The fine of $300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offence. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. Crosby's case, 3 Wils., 188; Williamson's case, 26 Pennsylvania State, 24; *ex parte* Kearney, 7 Wheaton, 41. This court can take cognizance of a criminal case only upon a certificate of division in opinion. In Crosby's case Mr. Justice BLACKSTONE said: 'The sole adjudication for contempt and the punishment thereof belongs exclusively and without interfering to each respective court.'"
>
> *New Orleans* vs. *Steamship Company*, 20 Wall., 392.

Again, in *Hayes* vs. *Fischer*, 102 U. S., 121, an attempt was made to have a conviction for contempt reviewed directly by a writ of error. In that case an interlocutory injunction was granted restraining the defendant below from infringing a patent. Complaint having been made against him for a violation of this injunction, proceedings were instituted against him for contempt, and after a hearing the court found him guilty of contempt and ordered that he pay a fine and stand committed until the order was obeyed. To reverse this order he sued out a writ of error. On a motion to dismiss the writ, this court said:

> "If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part

of the proceedings in the suit, was interlocutory only.

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *ex parte* Kearney, 7 Wheat., 38, and the rule then established was followed as late as *New Orleans* vs. *The Steamship Company*, 20 Wall., 387. It follows that we have no jurisdiction."

Hayes vs. *Fischer*, 102 U. S., 121, 122.

Since the decision of this case there seems no room for doubt that an order fining a person for contempt is not reviewable either by writ of error or appeal, and that the adjudication of the court committing for contempt is final if made in a case in which it has jurisdiction. If the court is without jurisdiction, the party has his remedy by *habeas corpus*. But if the jurisdiction is conceded, there is no way known to the law by which a mere error in the proceeding may be reviewed.

In *ex parte Fisk*, 113 U. S., 713, Mr. Justice MILLER said:

"There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this court. *Nor is there in the system of federal jurisprudence any relief against such orders when the court has authority to make them except through the court making the order, or possibly by the exercise of the pardoning power.*

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties and to enforce its judgments and orders

necessary to the due administration of law and the protection of the rights of suitors."

Ex parte Fisk, 113 U. S., 718.

This principle is so firmly established that in 1897 this court allowed a writ of certiorari to an order of the United States Circuit Court in California adjudging a party in contempt, the court saying:

"Judgments in proceedings in contempt are not reviewable here on appeal or error. *Hayes* vs. *Fischer*, 102 U. S., 121; *in re Debs*, 158 U. S., 564, 573; 159 U. S., 251. But they may be reached by certiorari in the absence of any other adequate remedy. The writ of certiorari will be allowed to bring up the record so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error and directing them or either of them to refrain from prosecuting the one writ in the name of the Bank and to dismiss the other, may be revised and annulled."

In re Chetwood, 165 U. S., 443, 462.

II.

The order finding Bessette guilty of contempt and sentencing him to pay a fine is in effect a judgment in a criminal case and can be reviewed, if at all, only by writ of error.

As early as the case of *ex parte Kearney*, 7 Wheaton, 38, this court said:

"If this were an application for a *habeas corpus* after judgment on an indictment for an offense within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment or the proceedings which led to it, or set it aside and discharge the prisoner. There is in principle no distinction between that case and the present; for

when a court commits a party for contempt their adjudication is a conviction, and their commitment in consequence is execution."

And in the case of *New Orleans* vs. *The Steamship Company*, 20 Wallace, 392, it was said:

"Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing."

This principle has been frequently reasserted by this court.

In *Tinsley* vs. *Anderson*, 171 U. S., 101, this court said:

"It was argued in behalf of Tinsley that the judgment committing him for contempt was not reviewable by this court, citing the statement in Chetwood's case, 165 U. S., 443-462, that 'judgments in proceedings in contempt are not reviewable here on appeal or error.' * * * But that statement was made in regard to such judgments in independent proceedings for contempt in the Circuit Courts of the United States, and the reason is, as in the cases referred to in *Hayes* vs. *Fischer*, above cited, that such judgments were considered as judgments in criminal cases, in which this court had no appellate jurisdiction from those courts. *Ex parte Kearney*, 7 Wheat., 38, 42; *New Orleans* vs. *Steamship Co.*, 20 Wall., 387, 392.

"But the appellate jurisdiction of this court from the state court extends to a final judgment or decree in any suit, civil or criminal, in the highest court of a state where a decision in the suit could be had against a title, right, privilege or immunity specially set up and claimed under the constitution or a treaty or statute of the United States."

Tinsley vs. *Anderson*, 171 U. S., 101, 105.

As late as the case of *O'Neal* vs. *The United States*, 190 U. S., 36, the same rule was reasserted. In that case a trustee in bankruptcy filed a petition in the District Court charging O'Neal with contempt in committing an assault upon him. A rule to show cause was entered, and after a hearing O'Neal was found guilty and sentenced to imprisonment. The District Court certified to the Supreme Court the question of its jurisdiction. Mr. Chief Justice FULLER, delivering the opinion of the court, after holding that the jurisdiction of the District Court was not involved on the appeal, said:

> "And while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case over which this court has no jurisdiction on error."
>
> *O'Neal* vs. *United States*, 190 U. S., 36, 38.

Thus it follows that the judgment appealed from by Bessette in the case at bar is a judgment in a criminal case, a conviction for a criminal offense, and, therefore, can be reviewed, if at all, only by writ of error, and not by appeal.

Bucklin vs. *U. S.*, 159 U. S., 680.

The two grounds upon which orders, like the one under consideration in this proceeding, have been held not to be reviewable are—*first*, that the finding by any court of the fact of contempt, is a matter exclusively for the determination of that court; and, *secondly*, that such orders are judgments in criminal cases of which this court formerly had no appellate jurisdiction. Both of these grounds were relied upon in *ex parte* Kearney and the subsequent cases which we have cited.

Since the passage of the Circuit Court of Appeals Act of March 3, 1891, the impression seems to have arisen in some quarters that the decisions of this court, to which we

have referred, were no longer applicable. According to this theory, which has taken root in the Second Circuit, all the cases are to be explained by the lack of power in this court to review criminal cases.

The Circuit Court of Appeals for the Second Circuit held, that inasmuch as it had jurisdiction to review judgments in criminal cases, it has, under some circumstances, power to review commitments for contempt.

But that court, while claiming such jurisdiction, has always insisted *that it is to be exercised only upon writ of error and not on appeal.*

Thus in the case of *Sessions* vs. *Gould*, 63 Fed. Rep., 1001, where an appeal was taken from an order directing a defendant to pay a fine for violation of a preliminary injunction, the Circuit Court of Appeals for the Second Circuit dismissed the appeal for want of jurisdiction, saying:

> "While there is no doubt of the jurisdiction of this court under Section 6 of the Act to Establish Circuit Courts of Appeals (26 Stat., 826) to review a criminal judgment, not a conviction of a capital or otherwise infamous crime, it can only do so upon a writ of error. A judgment in a common law proceeding is not removed by an appeal."
>
> *Sessions* vs. *Gould*, 63 Fed. Rep., 1002.

Subsequently the defendant in that case sued out a writ of error and the Court of Appeals then took jurisdiction.

Sessions vs. *Gould*, 67 Fed. Rep., 164.

In *Butler* vs. *Fayerweather*, 91 Fed. Rep., 458, and in *Nassau Elec. R. R. Co.* vs. *Sprague Elec. Ry.*, 95 Fed. Rep., 415, the same court conceded that under the decision of this court in the Debs case, 158 U. S., 564, its decision in the case of *Sessions* vs. *Gould* was erroneous, and that the order could only be reviewed upon an appeal from the final decree.

The court, however, distinguished the Debs case from a case where a person not a party to the suit was committed for contempt, and held that in such a case the person committed might still have his writ of error, and they adhered to this distinction in the case of *Flower* vs. *McGinnis*, 112 Fed. Rep., 377.

In the other circuits the precise question does not seem to have arisen, although in *Morgan* vs. *Gibson*, 122 Fed. Rep., 420, the Circuit Court of Appeals for the Eighth Circuit reviewed a judgment for contempt on an appeal from the final decree.

The result of these cases is that the Court of Appeals for the Second Circuit, the only United States Court with appellate jurisdiction which allows a review of a commitment for contempt before final decree, allows it, however, only to one not a party to the case, and then only upon writ of error and not upon appeal. There is in short absolutely no authority for the practice adopted in the case at bar, by which Bessette has undertaken to have the order of commitment for contempt reviewed by a direct appeal from that order.

The fourth question certified by the Circuit Court of Appeals for the Seventh Circuit presents the question whether the order appealed from by Bessette could be reviewed upon writ of error. As we view the matter, that question is immaterial. Even if appellant Bessette would have been entitled to a writ of error, he has not chosen to avail himself of that remedy, and the only question properly before this court is whether he was entitled to an appeal. This is admitted by his counsel in his brief (p. 171).

The fourth question certified by the Court of Appeals may therefore be disregarded.

III.

The Act of March 3, 1891, creating Circuit Courts of Appeals did not give an appeal or writ of error from orders or judgments which prior thereto were not reviewable.

The Act of March 3, 1891, was passed, as is well known, and as has frequently been stated by this court, to relieve its crowded docket. There is nothing in the act itself, or in the circumstances surrounding its enactment, which lends color to the notion that Congress intended to grant the right to review any judgment which was not reviewable before the passage of the act. Had Congress designed to make such a radical change in the rules of practice and procedure which had been settled in the courts of the United States for more than a century, the act itself would have expressed that intention in clear and unmistakable terms, and not left it to a mere possible implication.

The decisions of the Supreme Court on this subject must have been well known to the distinguished members of the Judiciary Committee of the Senate at the time the Act of 1891 became a law, and it was but a few years prior to its passage that Mr. Justice MILLER in *ex parte* Fisk used the following words:

> "There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court. Nor is there in the system of federal jurisprudence any relief against such orders when the court has authority to make them except through the court making the order, or possibly by the exercise of the pardoning power."
>
> *Ex parte* Fisk, 113 U. S., 718.

The notion that the Circuit Court of Appeals Act of March 3, 1891, enlarged the federal appellate jurisdiction, appears to have originated in the remarks of Judge LACOMBE in the Spofford case (62 Fed. Rep., 443). In that case, Judge LACOMBE, conceding that by the decisions of this court, the action of a Circuit Court in committing for contempt, could not be reviewed on appeal or writ of error, said:

> "The old common law rule, however, that the order of a court, whose decisions on all other questions are reviewable, is sacred, and not to be inquired into, when it inflicts punishment for contempt, seems abhorrent to the sense of natural justice. It puts the property and personal liberty of one individual practically at the mercy of another, who, being human, may presumably act, upon occasions, mistakenly, or from prejudice or passion. And it may well be that the Circuit Court of Appeals may find in the broad grant of appellate jurisdiction to review final decisions of the Circuit Courts 'in all cases other than those (where jurisdiction to review is conferred on the Supreme Court),' which is contained in Section 6 of the Act of 1891, sufficient warrant for holding that final orders, such as the one here moved for, may be by it examined into, reversed or otherwise determined."
>
> *In re* Spofford, 62 Fed. Rep., 443, 444.

By these observations Judge Lacombe has set his judgment against the judgment of the most learned jurists of England and America, and has undertaken to override a practice which has been recognized and in force for more than one hundred years.

In the Crosby case, 3 Wils., 188, 204, Mr. Justice BLACKSTONE said:

> "It would occasion the utmost confusion if every court of this hall should have power to examine the

commitments of the other courts of the hall for contempts; so that the judgment and commitment of each respective court, as to contempts, must be final and without control. It is a confidence that may with perfect safety and security be reposed in the judges * * *. The objections which are brought of abusive consequences prove too much because they are applicable to all courts of *dernier resort*."

Mr. Justice STORY, in *ex parte Kearney*, *supra*, said:

"The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear this argument can be of no avail, and it will probably be found that there are also serious inconveniences on the other side. Wherever power is lodged, it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere."

And the Supreme Court of Pennsylvania, in Williamson's case, *supra*, said:

"If the power be abused there is no remedy but impeachment. The law was so held by this court in McLaughlin's case, 5 W. & S., 276, and by the Supreme Court of the United States in Kearney's case, 7 Wheat, 38. It was solemnly settled as part of the common law in Brass Crosby's case, 3 Wils., 188, in which sat two of the foremost jurists that England ever produced. We have not the smallest doubt that it is the law, and we must administer it as we find it. The only attempt ever made to disregard it was by a New York judge, 4 Johns Rep., 345, who was not supported by his brethren. This attempt was followed by all the evil and confusion which Blackstone and Kent and Story declared to be its necessary consequences."

Williamson's case, 26 Pa. St., 18.

The argument suggested by Judge Lacombe in *re* Spofford, *supra*, that the power of the trial court to commit for contempt is liable to abuse, has been analyzed and considered by all the eminent authorities whom we have cited in this brief. They have always held that the administration of justice demands that such power should be lodged in the trial court, and that without such final power, confusion and disorder would ensue and the authority and dignity of the court itself be seriously impaired.

The argument of Judge Lacombe, moreover, proves too much, because, if it is abhorrent to the sense of natural justice that a commitment for contempt of one not a party to the suit can not be controlled, it is equally abhorrent to hold that one who is a party to the suit, and is imprisoned for contempt, must sit in prison until a final decree has been rendered in his case.

The right to review orders committing for contempt must be determined by the meaning of the statute itself, construed in the light of the evil which the statute was designed to cure, and not by some fanciful principle of natural justice.

The contention that the Act of 1891 operated to enlarge the appellate jurisdiction was made in *McLish* vs. *Roff*, 141 U. S., 661, with reference to the jurisdiction of this court under section 5 of that Act.

It was there argued that because the fifth section provides that the Supreme Court shall have jurisdiction "in any case in which the jurisdiction of the court is in "issue," that therefore a writ of error might be sued out to review that question before final judgment.

But this court did not approve the reasoning, and held, in effect, that the Act of 1891 did not operate to extend the class of reviewable decisions, and that only final decisions could be reviewed.

> "It is a matter of public history, and is manifest on the face of that act, that its primary object was to facilitate the prompt disposition of cases in the Supreme Court, and to relieve it of the enormous overburden of suits and cases. * * * As to the mode and manner in which these revisory powers may be invoked, there is, we think, no provision in the act which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts as to extend the jurisdiction of the Supreme Court to the review of jurisdictional cases in advance of the final judgments upon them."
>
> *McLish* vs. *Roff*, 141 U. S., 661-666.

In other words, the purpose of the Act, as construed by this court, is not to enlarge the appellate jurisdiction of the courts of the United States, but only to change the distribution of that jurisdiction.

This view is strengthened by the fact that the Act of 1891 does not repeal specifically any of the earlier statutes regulating appeals and writs of error, except so far as necessary to provide a place in the Federal judicial system for the new Circuit Courts of Appeals.

Conclusion.

Our argument, in short, is that the law has never been altered, and that "the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal." But if it be held that the Act of 1891 operated to enlarge the

appellate jurisdiction, then we still insist that "contempt of court is a specific criminal offense" and that a conviction thereof can only be reviewed by writ of error and not by appeal.

Respectfully submitted,

JACOB NEWMAN,
SALMON O. LEVINSON,
BENJAMIN V. BECKER.
Counsel for Appellee.

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Office Supreme Court U. S.
FILED
JAN 19 1903
JAMES H. McKENNEY.
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No. ~~468~~. 1142.

EDWARD E. BESSETTE,
Appellant,

vs.

W. B. CONKEY COMPANY,
Appellee.

APPLICATION TO THE SUPREME COURT TO CONSIDER THE WHOLE RECORD.

(Memorandum Attached.)

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

Burford Print 11 Indianapolis.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

No. 462.

EDWARD E. BESSETTE,
Appellant,

vs.

W. B. CONKEY COMPANY,
Appellee.

APPLICATION TO THE SUPREME COURT TO CONSIDER THE WHOLE RECORD.

(Memorandum Attached.)

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

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EDWARD E. BESSETTE,
Appellant,

vs.

W. B. CONKEY COMPANY,
Appellee.

APPLICATION TO THE SUPREME COURT TO CONSIDER THE WHOLE RECORD.

(Memorandum Attached.)

The appellant, Edward E. Bessette, hereby makes application to the Honorable the Supreme Court of the United States, that the whole record and cause herein may be sent up from the United States Circuit Court of Appeals for the Seventh Circuit to this Honorable Court for its consideration, and the appellant, as a part of this his application, hereby furnishes this Court with a duly certified copy of the whole of said record, the same being marked "Exhibit A" and filed herewith, and he humbly prays that upon

consideration of said record that the judgment of the United States Circuit Court for the District of Indiana be in all things reversed.

WILLIAM VELPEAU ROOKER,
Attorney for Edward E. Bessette.

The W. B. Conkey Company, appellee in the cause above entitled, will take notice than on Monday, the 19th day of January A. D. 1903, or as soon thereafter as counsel can be heard, Edward E. Bessette, the appellant, will, at the Court Room of the Supreme Court of the United States, in the City of Washington, D. C., present the foregoing motion to the Honorable the Supreme Court of the United States and thereupon ask that said motion be heard.

WILLIAM VELPEAU ROOKER,
As Attorney for the Appellant, Edward E. Bessette.

We hereby acknowledge the receipt of a copy of the foregoing motion and notice this 8th day of January, A. D. 1903.

MORRIS & NEWBERGER,
Of Attorneys for the Appellee, The W. B. Conkey Company.

MEMORANDUM: The appellant's reasons for the presentation of this motion are the same as those stated in the motion to advance, which is herewith concurrently presented, and which reasons are amplified in the appellant's brief in this cause in this Court and in his brief in this cause in the United States Circuit Court of Appeals for the Seventh Circuit, all of which have been duly filed in the office of the Clerk of this Court.

Respectfully submitted,

WILLIAM VELPEAU ROOKER,
As Attorney for the Appellant, Edward E. Bessette.

Indianapolis, Ind., January 8, 1903.

Office Supreme Court U. S.
FILED
FEB 25 1904
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

EDWARD E. BESSETTE,
Appellant,

v.

W. B. CONKEY COMPANY,
Appellee.

No. 142

Appellant's motion that Cause be taken up and assigned to a place on the docket.

WILLIAM VELPEAU ROOKER,
Attorney for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1903.

EDWARD E. BESSETTE,
Appellant,

v.

W. B. CONKEY COMPANY,
Appellee.

MOTION TO REINSTATE.

The appellant, Edward E. Bessette, by William Velpeau Rooker, his attorney, respectfully represents and would show unto this Honorable Court that the causes no longer exist for which this case was passed on the docket of the court; that on the 6th day of the present month the appellant's attorney of record requested the appellee's attorneys, Messrs. Jacob Newman, S. O. Levinson and B. V. Becker, to join in a request that said cause be heard, all as provided in and by rule

twenty-six and clause nine of the rules of this court; that the appellee's said attorneys have failed and refused to join in said request.

Whereupon the appellant, Edward E. Bessette, moves the court to take up said case and that the same be assigned to such place upon the docket as the court may direct.

WILLIAM VELPEAU ROOKER,
Attorney for Edward E. Bessette.

William V. Rooker, being first duly sworn upon his oath says: That he is the attorney of record for the appellant in the cause entitled and as such prepared the foregoing motion; that the facts in the premises lie peculiarly within the knowledge of this affiant and for that reason this affiant makes this affidavit for and in behalf of the appellant and further says, that the foregoing motion is true in substance and in fact.

And further affiant saith not.

WILLIAM V. ROOKER.

Subscribed in my presence and sworn to before me this 13th day of February, A. D. 1904.

[SEAL] E. H. KNIGHT,
Notary Public.

Commission expires November 11, 1907.

Supreme Court of the United States.

No. 142.—October Term, 1903.

Edward E. Bessette vs. W. B. Conkey Company. } On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[May 16, 1904.]

This case is before us on questions certified by the Circuit Court of Appeals for the Seventh Circuit. The facts as stated are that on August 24, 1901, the W. B. Conkey Company filed its bill of complaint in the Circuit Court of the United States for the District of Indiana against several parties, praying an injunction, provisional and perpetual, restraining the defendants, their confederates, agents and servants, from interfering with the operation of its printing and publishing house. A temporary restraining order was issued, and on December 3, 1901, a perpetual injunction was ordered against all the defendants appearing or served with process. On September 13, 1901, the complainant filed its verified petition, informing the court that various persons, among them Edward E. Bessette, (who was not named as a party defendant in the bill,) with knowledge of the restraining order had violated it, describing fully the manner of the violation. Upon the filing of that petition Bessette was ordered to appear before the court and show cause why he should not be punished for contempt in violating the restraining order. He appeared and filed his answer to the charges, and upon a hearing the court found him guilty of contempt and imposed a fine of $250. From this order or judgment Bessette prayed an appeal to the Circuit Court of Appeals, which was allowed, and the record filed in that court. Upon these facts the Circuit Court of Appeals certified the following questions:

"First. Whether the Circuit Court of Appeals has jurisdiction to review an order or judgment of the Circuit Court of the United States, finding a person guilty of contempt for violation of an order of that court and imposing a fine for the contempt.

"Second. Whether the 'act to establish Circuit Courts of Appeals and to define and regulate in certain cases jurisdiction of the courts of the United States, and for other purposes,' approved March 3, 1891, (26 Stat. 826,) authorizes a review by a Circuit Court of Appeals of a judgment or order of a Circuit Court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that court made in such suit, and imposing a fine for such contempt.

"Third. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by appeal.

"Fourth. Whether, if such review be sanctioned by law, a person so adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the Circuit Court of Appeals by writ of error."

Mr. Justice BREWER delivered the opinion of the Court.

The primary question is whether the Circuit Court of Appeals can review an order of a District or Circuit Court in contempt proceedings. A secondary question is, how, if there be a right of review, can it be exercised?

A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action.

The power to punish for contempt is inherent in all courts. It is true Congress, by statute, (1 Stat. 83,) declared that the courts of the United States "shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." And this general power was limited by the act of March 2, 1831, (4 Stat. 487; R. S. sec. 725,) the limitation being—

"That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

But in respect to this it was held in *Ex parte Robinson*, (19 Wall. 505, 510):

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by acts of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted."

The purpose of contempt proceedings is to uphold the power of the court and also to secure to suitors therein the rights by it awarded. As said in *In re Chiles*, (22 Wall. 157, 168):

"The exercise of this power has a two-fold aspect, namely: first, the proper punishment of the guilty party for his disrespect to the court or its order, and the second, to compel his performance of some act or duty required of him by the court, which he refuses to perform."

In *In re Nevitt*, (54 C. C. A. 622–632; 117 Fed. Rep. 448, 458,) Judge Sanborn, of the Court of Appeals for the Eighth Circuit, considered the nature of contempt proceedings at some length. We quote the following from his opinion:

"Proceedings for contempts are of two classes, those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. (*Thompson* v. *Railroad Co.*, 48 N. J. Eq. 105, 108, 21 Atl. 182; *Hendryx* v. *Fitzpatrick*, [C. C.] 19 Fed. Rep. 810; *Ex parte Culliford*, 8 Barn. & C. 220; *Rex* v. *Edwards*, 9 Barn. & C. 652; *People* v. *Court of Oyer and Terminer*, 101 N. Y. 245, 247, 4 N. E. 259, 54 Am. Rep. 691; *Phillips* v. *Welch*, 11 Nev. 187, 190; *State* v. *Knight*, 3 S. D. 509, 513, 54 N. W. 412, 44 Am. St. Rep. 809; *People* v. *McKane*, 78 Hun, 154, 160, 28 N. Y. Supp. 981, 4 Bl. Comm. 285; 7 Am. & Eng. Enc. Law, 68.) A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings." See also Rapalje on Contempts, sec. 21.

Doubtless the distinction referred to in this quotation is the cause of the difference in the rulings of various State courts as to the right of review. Manifestly if one inside of a court room disturbs the order of proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court, yet it is not misconduct in which any individual suitor is specially interested. It is more like an ordinary crime which affects the public at large, and the criminal nature of the act is the dominant feature. On the other hand, if in the progress of a suit a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a

remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. He is the one primarily interested, and if it should turn out on appeal from the final decree in the case that the original order was erroneous, there would in most cases be great propriety in setting aside the punishment which was imposed for disobeying an order to which the adverse party was not entitled.

It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a character and in such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party.

In the case at bar the controversy between the parties to the suit was settled by final decree and from that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet being no party to the suit he was found guilty of an act in resistance of the order of the court. His case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a court room or disobedience of a subpœna, as among those acts primarily directed against the power of the court, and in that view of the case we pass to a consideration of the questions presented.

In *In re Debs*, (158 U. S. 564,) a case of *habeas corpus* brought to review an order of the Circuit Court imprisoning for contempt, we said (p. 596):

"In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."

And again, in summing up our conclusions (p. 599):

"That the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defence to a prosecution for any criminal offences committed in the course of such violation."

At common law it was undoubted that no court reviewed the proceedings of another court in contempt matters. In *Crosby's Case*, (3 Wils. 188,) Mr. Justice Blackstone said:

"The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court."

In the case of *Ex parte Yates*, (4 Johns. 318, 369,) Chief Justice Kent, after reviewing the English cases and referring to the case of *The Earl of Shaftsbury*, (1 Mod. 144,) concluded as follows:

"The court, in that case, seem to have laid down a principle from which they never have departed, and which is essential to the due administration of justice. This principle, that every court, at least of the superior kind, in which great confidence is placed, must be the sole judge, in the last resort, of contempts arising therein, is more explicitly defined and more emphatically enforced in the two subsequent cases of *The Queen* v. *Paty and others*, and of *The King* v. *Crosby*."

Without stopping to notice the decisions of the courts of the several States, whose decisions are more or less influenced by the statutes of those States, we turn to an examination of the rulings of this court in respect to the finality of contempt proceedings.

In *Ex parte Kearney*, (7 Wheat. 38,) a writ of *habeas corpus* was issued by this court in behalf of a party committed to jail by the Circuit Court of the District of Columbia for contempt in refusing to answer a question put to him on a trial. The application for a discharge was refused. The reasons therefor are disclosed by the following quotations from the opinion delivered by Mr. Justice Story (p. 42):

"It is to be considered that this court has no appellate jurisdiction confided to it in criminal cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the Circuit Court, in any case where a party has been convicted of a public offence. . . . If, then, this court cannot directly revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose that it was intended to vest it with the authority to do it indirectly? . . . If this were an application for an *habeas corpus*, after judgment on an indictment for an offence within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside and discharge the prisoner. There is, in principle, no distinction between that case and the present; for when a court commits a party for a contempt, their adjudication is a conviction, and their commitment, in consequence, is execution; and so the law was settled, upon full deliberation, in the case of *Brass Crosby, Lord Mayor of London*, 3 Wilson, 188."

New Orleans v. *Steamship Company*, (20 Wall. 387,) was a suit by the company in the Circuit Court of the United States for an injunction restraining the city from interfering with its possession of certain premises. Pending this suit the mayor of the city applied to a State court for an injunction restraining the company from rebuilding an inclosure of the premises which the city had destroyed, and the injunction was granted. At this time the city was the only party defendant in the Circuit Court, although service upon it had been made by delivering process to the mayor. Subsequently the mayor was made a party defendant by a supplemental bill. A final decree was entered against the defendants, and, as a part thereof, was an order adjudging the mayor guilty of contempt in suing out the injunction in the State court and imposing a fine therefor. Thereupon the case was brought to this court, and among other things the validity of the

punishment for contempt was challenged, in respect to which we said (p. 392):

"The fine of $300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offence. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

Hayes v. *Fischer*, (102 U. S. 121,) was a suit in equity to restrain the use of a patented device. An interlocutory injunction was granted. The defendant was fined for contempt in violating this injunction, and the entire amount of the fine ordered to be paid over to the plaintiff in reimbursement. To reverse this order defendant sued out a writ of error. A motion to dismiss was sustained, Mr. Chief Justice Waite saying for the court (p. 122):

"If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only.

"If the proceeding below, being for contempt, was independent of and separate from the original suit, it cannot be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in *Ex parte Kearney*, (7 Wheat. 38,) and the rule then established was followed as late as *New Orleans* v. *Steamship Company*, (20 Wall. 387.) It follows that we have no jurisdiction."

In *Ex parte Fisk*, a case of *habeas corpus*, (113 U. S. 713, 718,) Mr. Justice Miller, speaking for the court, declared:

"There can be no doubt of the proposition that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this court. Nor is there in the system of Federal jurisprudence any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power.

"This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors."

In *Worden* v. *Searls*, (121 U. S. 14,) a final decree was entered in a suit for infringement of a patent, in favor of the plaintiff, and from that decree the defendants appealed. A preliminary injunction had been granted, and prior to the final decree the defendants were adjudged guilty of a contempt in violating it, and ordered to pay to the complainant the sum of $250 as a fine therefor, together with the costs of the contempt proceedings. This

court was of opinion that the decree in favor of the plaintiff was erroneous, and reversed it; and in addition to directing a dismissal of the bill, set aside the order imposing the fines in the contempt proceedings, saying in respect thereto (p. 25):

"We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent."

But, while setting aside the orders imposing the fines, it was "without prejudice to the power and right of the Circuit Court to punish the contempt referred to in those orders by a proper proceeding."

Again, in *In re Chetwood*, an application for prohibition, (165 U. S. 443, 462,) is this ruling:

"Judgments in proceedings in contempt are not reviewable here on appeal or error. (*Hayes* v. *Fischer*, 102 U. S. 121; *In re Debs*, 158 U. S. 564, 573; 159 U. S. 251.) But they may be reached by certiorari in the absence of any other adequate remedy. The writ of certiorari will be allowed to bring up the record, so that the order adjudging Chetwood and his counsel in contempt for being concerned in suing out the writs of error and directing them, or either of them, to refrain from prosecuting the one writ in the name of the bank, and to dismiss the other, may be revised and annulled."

In *O'Neal* v. *United States*, (190 U. S. 36,) in which an order of the District Court punishing for contempt was brought here on writ of error, we said (p. 38):

"While proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. (Sec. 5, act of March 3, 1891, 26 Stat. 826, c. 517, as amended by the act of January 20, 1897, 29 Stat. 492, c. 68; *Chetwood's case*, 165 U. S. 443, 462; *Tinsley* v. *Anderson*, 171 U. S. 101, 105; *Cary Manufacturing Company* v. *Acme Company*, 187 U. S. 427, 428.)"

In *In re Watts and Sachs*, (190 U. S. 1,) the petitioners having been found guilty of a contempt of court by the District Court of Indiana, applied for a writ of *habeas corpus*. We issued with that writ a certiorari and brought the entire record to this court, and upon the evidence discharged the petitioners.

From these decisions it is apparent that the uniform ruling of this court has been against the right to review the decisions of the lower court in contempt proceedings by writ of error, or by appeal, except in cases of purely remedial and interlocutory orders. Yet we have issued certioraries in aid of *habeas corpus* proceedings and applications for prohibition by which the

facts in the contempt case have been brought before us, and then we have passed upon the merits of the decision in the lower court.

The thought underlying the denial by this court of the right of review by writ of error or appeal has not been that there was something in contempt proceedings which rendered them not properly open to review, but that they were of a criminal nature and no provision had been made for a review of criminal cases. This was true in England as here. In that country, as is well known, there was no review of criminal cases by appeal or writ of error. Neither was there in our Federal system prior to the act of January 25, 1889, (25 Stat. 656,) which provided for a writ of error from this court in capital cases. While the act creating the Court of Appeals, March 3, 1891, (26 Stat. 826,) authorized a review of criminal cases, yet it limited the jurisdiction of this court to cases of a conviction for a capital or otherwise infamous crime—since limited to capital cases—(29 Stat. 492,) and gave the right of review of all other criminal cases to the Circuit Courts of Appeal, and, of course, a proceeding in contempt cannot be considered as an infamous crime. *Habeas corpus* is not treated as a writ of error, and while it may be issued by one court to inquire into the action of a court of co-ordinate jurisdiction, yet the inquiry is only whether the action of the court in imposing punishment was within its jurisdiction. Even in an appellate court the writ of *habeas corpus* is not of itself the equivalent of a writ of error, although when supplemented by certiorari, as shown in the case of *In re Watts and Sachs*, *supra*, it may bring the whole case before the appellate court for review.

The act of March 3, 1891, establishing Circuit Courts of Appeals must now be more fully considered. While its primary purpose was the relief of this court by the creation of new appellate courts and the distribution between those courts and this of the entire appellate jurisdiction of the United States, (*The Paquette Habana*, 175 U. S. 677, 681 and cases cited,) yet it also enlarged the area of appellate jurisdiction. As originally passed it gave to this court jurisdiction over cases of infamous crimes in addition to that which it theretofore had in capital cases. By section 6 it gave to the Circuit Courts of Appeals appellate jurisdiction to review by appeal or writ of error final decisions in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section. That this was intended to include criminal cases is evident from a subsequent clause, which makes the decision of the Courts of Appeals final "in all cases arising . . . under the criminal laws." See *United States* v. *Rider*, (163 U. S. 132, 138,) in which, referring to sections 5 and 6, we said:

"Thus appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the Circuit Courts of Appeals."

As, therefore, the ground upon which a review by this court of a final decision in contempt cases was denied no longer exists, the decisions themselves cease to have controlling authority, and whether the Circuit Courts of Appeals have authority to review proceedings in contempt in the District and Circuit Courts depends upon the question whether such proceedings are criminal cases. That they are criminal in their nature has been constantly affirmed.

The orders imposing punishment are final. Why, then, should they not be reviewed as final decisions in other criminal cases? It is true they are peculiar in some respects, rightfully styled *sui generis*. They are triable only by the court against whose authority the contempts are charged. No jury passes upon the facts; no other court inquires into the charge. (*Ex parte Tillinghast*, 4 Pet. 108.) As said by Mr. Justice Miller, speaking for the court, in *Eilenbecker* v. *Plymouth County*, (134 U. S. 31, 36):

"If it has ever been understood that proceedings according to the common law for contempt of court have been subject to the right of trial by jury, we have been unable to find any instance of it. It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vindicating its dignity, of enforcing its orders, of protecting itself from insult, without the necessity of calling upon a jury to assist it in the exercise of this power."

See also *In re Debs*, *supra*, in which we said (p. 594):

"But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders, it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

But the mode of trial does not change the nature of the proceeding or take away the finality of the decision. So when, by section 6 of the Courts of Appeals act, the Circuit Courts of Appeals are given jurisdiction to review the "final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and the preceding section gives to this court jurisdiction to review convictions in only capital or otherwise infamous crimes, and no other provision is found in the statutes for a review of the final order in contempt cases, upon what satisfactory ground can it be held that the final decisions in contempt cases in the Circuit or District Courts are not subject to review by the Circuit Courts of Appeals? Considering only such cases of contempt as the present—that is, cases in which the proceedings are against one not a party to the suit, and cannot be regarded as interlocutory—we are of opinion that there

is a right of review in the Circuit Court of Appeals. Such review must, according to the settled law of this court, be by writ of error. (*Walker* v. *Dreville*, 12 Wall. 440; *Deland* v. *Platte County*, 155 U. S. 221; *Bucklin* v. *United States*, 159 U. S. 680.) On such a writ only matters of law are considered. The decision of the trial tribunal, court or jury, deciding the facts, is conclusive as to them.

We, therefore, answer the questions in this way: The second and fourth in the affirmative, the third in the negative. It is unnecessary to answer the first.

True copy.

Test:

Clerk Supreme Court, U. S.